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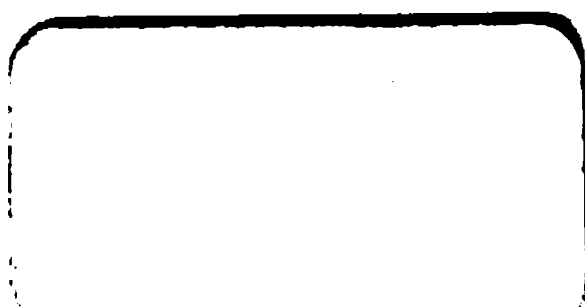
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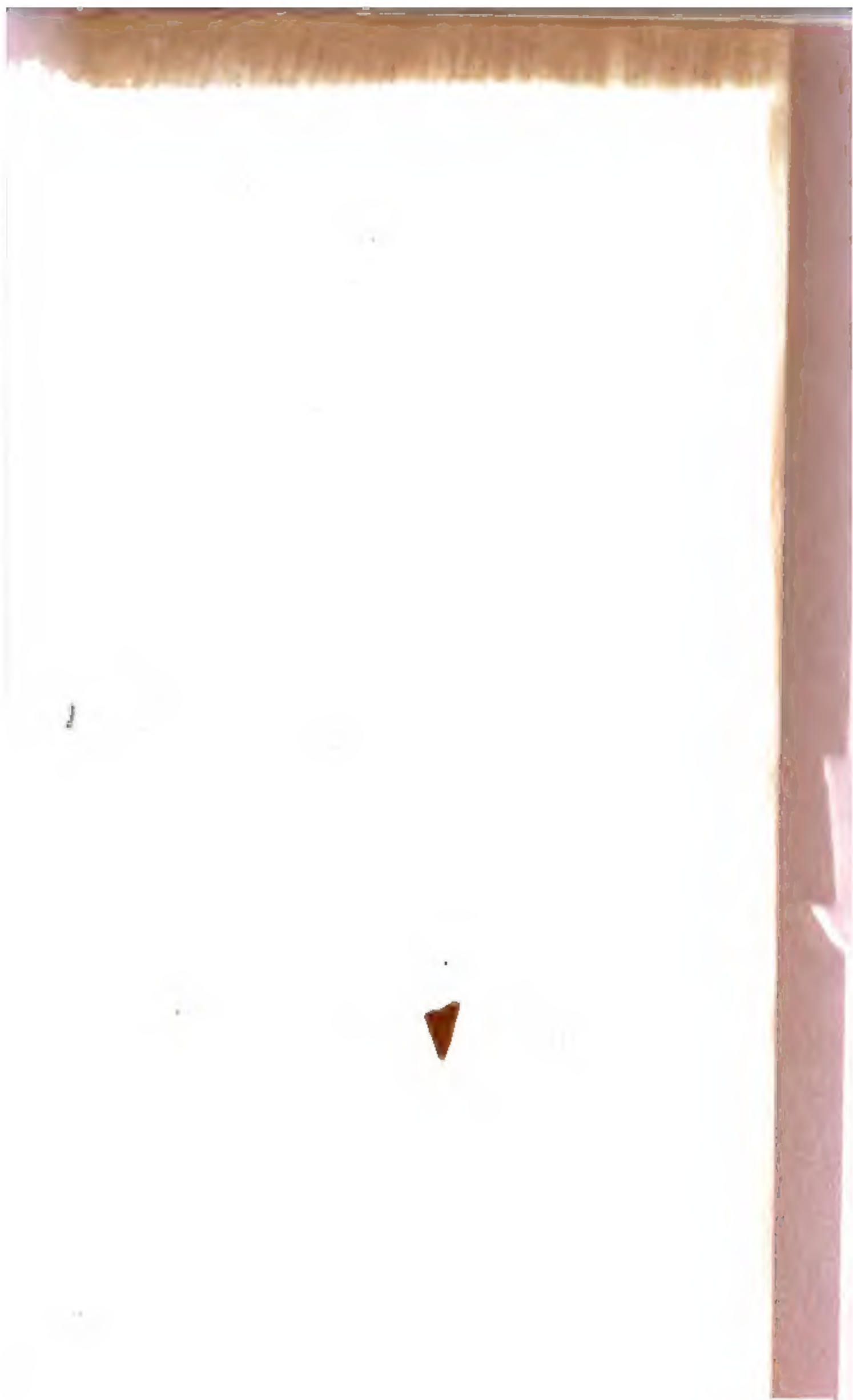
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CONTAINING

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OF THE

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WITH

NOTES AND REFERENCES

BY

ISAAC GRANT THOMPSON.

VOL. XIX.

CONTAINING ALL CASES OF GENERAL IMPORTANCE IN THE FOLLOWING
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49 IND.; 50 IND.; 51 IND.; 13 KAN.; 14 KAN.; 114 MASS.;
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4 NEB.; 60 N. Y.; 61 N. Y.; 38 TEXAS;
39 TEXAS; 40 TEXAS; 41 TEXAS;
42 TEXAS; 47 VT.; 37 WIS.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY.

LAW PUBLISHERS AND LAW BOOKSELLERS.

1877.

121659

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† Appointed vice Grover.

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CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

BAROUS V. STATE.

(49 Miss. 17.)

Criminal Law — indictment — variance — shooting with intent to kill.

An indictment charged that defendant shot M. with intent to kill. The evidence showed that he shot at C. with intent to kill him, missed him and shot M. *Held*, that the indictment was not good. (*See note, p. 2.*)

INDICTMENT charging that defendant shot with intent to kill one Sandy Mitchell. Upon the trial the proof showed that the defendant shot at one Henry Creighton with intent to kill him and not Mitchell.

The jury found the defendant guilty as charged in the indictment.

A motion for a new trial was made, and overruled by the court, and plaintiff in error prosecuted a writ of error to this court and asks for a reversal.

Brien & Spears, for plaintiff in error.

J. S. Morris, Attorney-General, for the State.

TARBELL, J. At the last March term of the Circuit Court of Warren county the plaintiff in error was indicted, tried and convicted on a charge of shooting at Sandy Mitchell with intent to kill. From the judgment against him the accused prosecuted a writ of error, and asks here a reversal of that judgment upon several grounds not essential to repeat or discuss. Upon the trial the right of the city police to arrest vagrants, without warrant, was made a prominent point, and is again pressed in the argument in this court, but we do not think that question involved, at present. There is a fatal error, however, in this case, and it is this: There is no evidence that the accused shot at Sandy Mitchell. The

proof is, that he shot at Henry Creighton, and, according to his own declarations, subsequent to the shooting, intended to kill him. Upon this point there is no conflict in the evidence. It is positive, and uncontradicted, that he shot at Henry Creighton, accidentally hitting Sandy Mitchell, an innocent by-stander. The verdict is wholly unsupported by the evidence. It is true, that the jury, in response to the instruction for the State, have found, in substance, that the accused shot at Sandy Mitchell, with the intent to kill and murder him ; but the verdict must have been through some misapprehension of law or fact. There is no doubt of the rule, that a man shall be presumed to intend that which he does, or which is the natural and necessary consequence of his act ; and that malice, in this class of cases, may be presumed from the character of the weapon used. If the evidence in the case at bar was limited to the mere fact of shooting and the striking of Mitchell as the result of the shot, or if the evidence, as to the person intended to be killed, was conflicting, we might accept the verdict as conclusive ; but the record before us leaves no question or doubt. Indeed, it is conclusive, that Creighton, and not Mitchell, was the person aimed at and designed to hit. To sustain the indictment in this case, it was incumbent on the part of the State to prove that the accused shot at and intended to kill Mitchell, whereas the proof is, that he shot at Creighton with the intent to kill him. The essential averments of the indictment are, therefore, not only not sustained, but absolutely negatived. It follows, that the indictment should have charged the shooting to have been at Creighton, and the result is, the judgment must be reversed, and the indictment quashed, but the accused cannot be set at liberty. He will be detained in custody to await a trial under another indictment, to be drawn as herein indicated. 13 S. & M. 242; 11 id. 317 ; 24 Miss. 54 ; Code, § 2497.

Judgment reversed, and cause remanded, with a recommendation to the district attorney to quash this indictment, and instructions to the proper authorities to detain the accused, subject to the action of the Circuit Court of Warren county.

NOTE.—In *Hollywood v. People*, 2 Abb. Ct. App. Cas. 376 ; 3 Keyes, 55, the indictment was under a statute which provided that “ every person who shall be convicted of shooting at another, etc., with intent to kill, maim, ravish or rob such other person,” shall be imprisoned. The indictment charged A with shooting at B with intent to kill him, and the proof was that A shot at C with intent to kill him, and actually hit B. The prisoner’s counsel requested the court to charge that he could not be convicted of shooting B. It was held that this request was too broad, and was properly refused. The court said: “ It would seem that shooting at Bayly with intent to kill him and hitting Mrs. Bayly by mere mistake does not prove him guilty of shooting at her with intent to kill her ; but it is equally clear, however, that the prisoner might have been convicted under this indictment, of another offense than that described in this statute. At common law,

Barcus v. State.

feloniously or unlawfully firing or striking at one and hitting another, is an offense as to the latter, of which the prisoner might have been convicted under this indictment."

In *Rex v. Jarvis*, 2 M. & Rob. 40, an indictment under the statute for maliciously shooting at A, was supported by evidence that he was struck with the shot though the gun was aimed at a different person.

If A, having malice against B, strikes at him but misses him and kills C, this is murder in A; but if the blow be without malice and under such circumstances that if B had died it would have been but manslaughter, the killing of C is only manslaughter. Whart. Hom., § 42, citing 1 Hale, 379, 439, 466; Dyer, 128; *State v. Cooper*, 1 Green (N. J.), 381; *State v. Benton*, 2 Dev. & Bat. 196; *State v. Fulkerstone*, 1 Phil. L. (N. C.), 233; *R. v. Holt*, 7 C. & P. 519.

Where a policeman was lawfully attempting to arrest A and he shoots at the policeman intending to kill him, but kills B instead, he is guilty of the murder of B. *Angell v. The State*, 36 Tex. 542; S. C., 14 Am. Rep. 380.

So where the intent is not to kill but to inflict bodily harm the same rule applies; as where the prisoner shot at a person on horseback, declaring that he intended only to frighten the horse and cause him to throw the rider, and the ball hit and killed another person, it was held to be murder. *State v. Smith*, 2 Strobb. 77. The judge observed in that case, "if the prisoner's object had been nothing more than to make Carter's horse throw him and he had used such means only as were appropriate to that end, then there would be some reason for applying to this case the distinction that where the intent was to commit only a trespass or a misdemeanor, an accidental killing would be only manslaughter." Under the present usual statutory provisions such offense would be murder in the second degree. In Maine the rule of the common law is followed, that when death occurs by the act of one in the pursuit of an unlawful design without intent to kill, it will be either murder or manslaughter according as the intended offense is a felony or only a misdemeanor, as these offenses are defined by the statute. *State v. Smith*, 32 Me. 369. Compare *Commonwealth v. Hackett*, 2 Allen (Mass.), 136.

Where the prisoner had a quarrel with his wife and aimed a blow at her and it fell upon and killed his infant son, then in her arms, and it was shown that he was ignorant of his child's position and was in the heat of passion, it was held that he was guilty of the same grade of homicide that he would have been guilty of had the wife been killed. *Commonwealth v. Dougherty*, 7 Smith's Laws (Penn.) 695; Whart. Hom., § 45. But in *Bratton v. The State*, 10 Humph. 103, this case was expressly disapproved, and it was decided that if one meaning to kill a particular person accidentally executes the purpose on another, his offense of murder is only in the second degree.

So where a woman, in anger, took up a poker intending to frighten her son and he ran and she threw it at him, and it struck and killed one just entering the door, PARKER, J., said to the jury: "No doubt this poor woman had no more intention of injuring this particular child than I have, but that makes no difference in law. If a blow is aimed at an individual unlawfully — and this was undoubtedly unlawful as an improper mode of correction — and strikes another and kills him, it is manslaughter; and there is no doubt if the child at whom the blow was aimed had been struck and died it would have been manslaughter, and so it is under the present circumstances." *Rex v. Conner*, 7 C. & P. 348. So if in a sudden quarrel a blow is aimed at one and accidentally falls upon another and kills him, this was held manslaughter the same as if it had fallen on the person intended. *Rex v. Brown*, 1 Leach's C. C. 148.

But where a person goes into a crowd with a gun for the purpose of killing any person, and fires the gun for such purpose, but instead kills a friend, it is murder. *Gallagher v. Commonwealth*, 2 Duv. (Ky.) 163.

Where A, in lawful self-defense, or in lawful prevention of a felony, intending to kill B, accidentally kills C, this is excusable or justifiable homicide as the case may be Whart. Hom., § 47, *Levet's case*, Cro. Car. 438; *Aaron v. State*, 31 Ga. 167; *Morris v. Platt* 32 Conn. 75. REP.

Southern Express Company v. Craft.

SOUTHERN EXPRESS COMPANY v. CRAFT.

(49 Miss. 480.)

Action — against carrier for failure to carry — when consignor a proper party.

Plaintiff sent to D. by defendant, an express company, money which he owed D. and which he had agreed to send by express. Defendant failed to deliver it to D., and plaintiff afterward paid D. and brought this action to recover the money sent. *Held*, that plaintiff was the proper party to bring the action.

Semble, that an action against a carrier for breach of a contract to carry is well brought by the consignor whether the property was in him or not, because the carrier agreed with him to carry the goods safely, and the action is for a breach of that agreement. (See note, p. 12.)

ACTION against an express company for breach of a contract to carry money. The opinion states the case.

Featherston, Harris & Watson, for plaintiff in error.

Walter & Scruggs, for defendant in error.

TARBELL, J. According to the declaration, the Southern Express Company, on the 22d day of December, 1861, undertook, at the request of Heber Craft, to carry \$100 in money from Holly Springs, in this State, to Bowling Green, Kentucky, and there to deliver the same to J. D. Duncan, for the sum of \$1.50, which was paid by Craft. And, on the 4th day of January, 1862, undertook to carry \$65 to the same point, and to deliver to the same party, for the further consideration of \$1.50, which was also paid by Craft. At both the above dates the cars were running regularly between the two points named, and continued so to run until the 14th day of February thereafter, a period of about forty days. On the last day named, Bowling Green was evacuated by the Confederates, and was that night occupied by the Federals. The money was never delivered to Duncan, who testified that he often called at the office of the company for the money, but that it was never received by him. Several months thereafter, the money, while in the care of an agent of the company, in Nashville, was seized at that place, by the Federal authorities.

To the action the company pleaded the general issue, with notice that the money sued for was seized by the Federal troops during the late war without the fault of the company.

On the trial, it appeared that Craft, being in Kentucky, bought a horse of Duncan for \$165, and was to remit the money, by express,

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on his return to Holly Springs. There was no specific agreement that delivery to the company was to be considered payment or a discharge of Craft. Both Craft and Duncan testified, that Craft paid the money to Duncan after the war, and then brought this suit against the company. There was a verdict for plaintiff, and hence a writ of error. Two propositions were earnestly pressed by the company, in the court below, as they are here, viz.: 1. That the company used due diligence, but was prevented from performance by the public enemy; 2. That the action should have been brought in the name of Duncan.

As to the question of diligence, there is no evidence showing an interruption of communication by railroad between Holly Springs and Bowling Green after January 4, until February 14, 1862. These packages were delivered December 22, 1861, \$100, and January 4, 1862, \$65. And there is nothing shown why they should not have been forwarded and delivered within one week after their receipt at Holly Springs. We are well aware of the uncertainties of military operations, and the dangers incident to communication at such times. If, however, the verdict of the jury was not right, we see nothing in the record to justify its disturbance.

With reference to the proper party plaintiff, whether consignor or consignee, a critical examination of the authorities shows, that the right of action changes from the one to the other upon that which might, perhaps, be considered very nice distinctions. Under circumstances, the consignor, though without either a general or special interest in the property, may sue for damages *in transitu*, if no objection be made by the real owner. *Blanchard v. Page*, 8 Gray, 281. To illustrate: If, by the bill of lading, the contract to transport and deliver is with the shipper, then he may sue for damages to the goods, if not objected to by the real owners, though he be a mere agent, and without interest general or special. *Ib.* If, however, the bill of lading states the contract to be with the consignee, then he should sue. *Ib.*

In the authority referred to (8 Gray) the subject is very fully discussed, as it is also in *Hooper v. Chicago and North-western Railway Co.*, 27 Wis. 81; S. C., 9 Am. Rep. 439. In the latter case, it is said, the shipper of goods, who has contracted for their safe conveyance, may sue for injuries thereto in transportation, although the title of the goods has vested in the consignee. The court, in the course of a very able opinion, say: "The fourth and last position taken is, that the plaintiff was not the owner of the flour at the time of the loss, but that the title was in the consignees, who alone can maintain an action. In *Blanchard v. Page*, 8 Gray, 281, it was held, after a most elaborate examination, that the

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shipper named in a bill of lading may sue the carrier for an injury to the goods, although he has no property, general or special, therein. This, it was held, might be done by force of the original contract for safe carriage, made by the carrier with him. Such right of action upon the contract is not affected by the provision of the Code, which requires every action to be brought in the name of the real party in interest. The shipper is a party in interest to the contract, and it does not lie with the carrier, who made the contract with him, to say, upon a breach of it, that he is not entitled to recover the damages unless it be shown that the consignee objects, for, without that, it will be presumed that the action was commenced and is prosecuted with the knowledge and consent of the consignee, and for his benefit. The consignor or shipper is, by operation of the rule, regarded as a trustee of an express trust, like a factor, or other mercantile agent, who contracts, in his own name, on behalf of his principal. *Grinnell v. Schmidt*, 2 Sandf. S. C. 706; *Robbins v. Deverill*, 20 Wis. 148. Such is the true relation of the consignor; for, by the bill of lading, it appears that he made the contract in his own name, for the benefit of his consignee."

Joseph v. Knox, 3 Camp. 320, was an action by a shipper against a ship-owner, on a bill of lading, in which it was contended that the action would not lie, because the plaintiff did not appear to be the owner of the goods. Lord ELLENBOROUGH held, "that the action will lay on the privity of contract established between the parties, by means of the bill of lading. The plaintiff was the party from whom the consideration moved, and to whom the promise was made. After such a bill of lading, the ship-owner cannot say to the shippers they have no interest in the goods, and are not damnified by the breach of contract."

The Lord Chancellor of England, in a recent case in the House of Lords, after reviewing the authorities, announced the following as the doctrine agreed by the Lords to be declared in that case: "These authorities establish the proposition that, although, generally speaking, where there is a delivery to a carrier, to deliver to a consignee, he is the proper person to bring the action; yet, if the consignor made a special contract with the carrier, the special contract supersedes the necessity of showing the ownership in the goods, and the consignor, the person making the contract with the carrier, may maintain the action, though the goods may be the goods of the consignee." *Dunlop v. Lambert*, 6 Cl. & Fin. 600.

The opinion in *Blanchard v. Page*, *supra*, was by Chief Justice SHAW, who, at great length, analyzes the language, terms, conditions and purposes of a bill of lading, and reviews all the authorities in England

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and the United States. As in the case at bar, that was an action upon the contract to transport and deliver certain goods contained in the bill of lading. The contract was with the shipper, and the action was in his name, though he had neither a general or special property in the goods. The facts in that case were these: The goods were purchased in Boston, by Sutton, Griffiths & Co., of Fort Smith, Arkansas; the plaintiffs in the action were authorized and requested by Sutton, Griffiths & Co., to cause the goods to be shipped on board of a vessel for New Orleans, to a forwarding house there, named by them, A. Q. Gaines & Co., to be forwarded by them to the owners, at Fort Smith; and in the language of the court, "the evidence shows conclusively that all the goods were the property of Sutton, Griffiths & Co., at the time of the shipment and of the alleged loss." The court then say: "We therefore assume, for the purpose of discussing this question intelligently, that they were the sole owners of the goods during their transit; that neither Blanchard, Converse & Co., the shippers, and present plaintiffs, had any interest in the goods, or in their safe carriage and delivery, except what arises from the bill of lading itself; nor had Gaines & Co., the consignees, at New Orleans, any interest in the goods, but only an authority from Sutton, Griffiths & Co., to receive the goods as their agents at New Orleans, and forward the same to them at Fort Smith, a distant point in the interior, to pay the freight, and take suitable measures for so forwarding the goods."

Of the bill of lading, besides an analysis of its language and terms, the court observe: "The bill of lading does not contain express words importing promise, contract, or stipulation; but it contains words equivalent. It is an acknowledgment of the receipt of the goods, for the purpose of carriage, that they are received of A B, the shipper, and in the absence of any such words as, 'for account and risk of C D,' or 'by order or for account of E F,' the consignee, and in the absence of any terms describing the shipper as agent, or stating the property to be in another person, no presumption can arise in favor of any other party. It is an admission on the part of the ship-owner that he has received the goods from the shipper, and that the possession came to him from the shipper; that he is the owner, or has the power of an owner, and has a right to direct the destination of the goods, and has good right to contract with the ship-owner for their safe carriage."

In that case, the contract of shipment was made by the plaintiffs, as the agents of Griffiths & Co., whose names were not mentioned, whereupon the court remark: "The question is not whether Griffiths & Co., as principals, might not maintain an action on a contract made for their account, by their agent; but whether the plaintiffs, as the party actually

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making the contract, in the absence of any action brought by the principal, may not maintain the action."

The conclusion in the case quoted from is this: "It does not appear in the present case, that the owners of the goods have ever made any objection to the maintenance of this action by the plaintiffs. On the contrary, we understand that it was commenced and is prosecuted with their knowledge and consent, and for their benefit. And the court are of opinion that this action can be maintained by the plaintiffs, being the original shippers and consignors in the bill of lading, by force of the original contract for safe carriage, made by the defendants with them; and it is not for the defendants to say that, upon a breach of that contract, the plaintiffs, with whom it was made, are not entitled to recover the damages, which are the direct and natural consequence of such breach of contract."

By such a contract, the shipper, though without either a general or special interest in the property, agrees to pay the freight if the consignee does not, and he is, upon this undertaking, responsible to, and may be sued by, the ship-owners, for the freight. And, as shown, the shipper may have an action in his own name, for damages to the goods. In other words, the contract is reciprocal.

The counsel in the very interesting case of *Blanchard v. Page* insisted, as do counsel in the case at bar, that delivery to a carrier, whether evidenced by a bill of lading or not, vests the property in the consignee, who ought, therefore, except in the few special cases mentioned by him, to sue for any injury to the goods; that the bill of lading is first to be looked to as the medium of the intent of the parties; that in the ordinary form of the bill of lading, as in that case (and in the case at bar), the property *prima facie* vests in the consignee, and he alone is entitled to sue. The counsel conceded, however, that if it appears by the bill of lading, or by extrinsic evidence, that the property described therein is shipped on account of the consignor, or at his risk, or if he pays the freight thereon (as in the case at bar), or makes a special contract for carriage (as here), then there is established a priority of contract between him and the carrier, and the contract of carriage is presumed to be with him and he may sue. And he cited 1 Atk. 248; 1 Ld. Raym. 271; 8 T. R. 330; 3 Bos. & Pul. 582; 2 Campb. 36; 4 B. & C. 219; 1 Johns. 215; 8 How. 439; 17 id. 100; 6 East. 21; 5 Metc. 306; Morton on Vendors, 416; 1 Walford on Parties, 31 *et seq.* It was further insisted, by the counsel, that the only excepted cases are these: (1.) *When the shipper or consignor pays the freight, or makes a special contract.* 5 Bur. 2680; 1 T. R. 659; 3 Cowp. 320; 6 Cl. & Fin. 600. (2.) When the consignor or shipper retains the property in

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the goods. 3 B. & Ald. 277; 5 id. 350; 1 M. & Rob. 233. (3.) When the consignor and consignee are both interested in the goods, as in the case of bailor and bailee. 1 Nev. & Man. 420.

In what respect the conclusions of the court differed from the views and concessions of learned counsel in that case, may be noted by a comparison of the quotations given above.

The result of the cases as stated in Abbot on Shipping, 337, is this: "In the case of an express contract, evidenced by a bill of lading, the action may be brought by the shipper with whom the master contracted, or by the owner of the goods, whose agent the shipper was."

Mr. Justice BAILEY, in *Sargent v. Morris*, 3 B. & Ald. 277, says: "Now I take the rule to be this — if an agent acts for me and in my behalf, but in his own name, then, inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name to say that he is merely an agent; unless you can also show that he is prohibited from carrying on that action by the person on whose behalf the contract was made. In such cases, however, you may bring your action, either in the name of the party by whom the contract was made, or of the party for whom the contract was made."

ABBOTT, Ch. J., drew the distinction between that case, which was for breach of the undertaking of the ship-owner to carry safely, and a case where the goods have vested in the consignee, on which an action in another form might be brought; and he remarks: "A transfer of the property is, however, very different from a transfer of the contract."

It is stated in 2 Redf. Law of Railw., p. 171, § 175 (8), that "actions against carriers may be brought in the name of bailees or agents, who have the rightful custody of the goods, *and who make the bailment*, or in the name of the owner."

In support of the point made in behalf of the plaintiffs in error, that upon the delivery of the packages to the express company at Holly Springs, the title to the money vested in Duncan, and, therefore, that this suit should have been brought in his name. Reference is made to 1 Ch. Pl. 5, 6, 70; *The Frances*, 9 Cranch, 183; *The Mary and Susan*, 1 Wheat. 25; *Grove v. Brien*, 8 How. 429; 2 Kent, 499; *Bonner v. Marsh*, 10 S. & M. 376; and *Sheets v. Wilgus*, 56 Barb. 662.

As understood, these authorities show: (1.) When the right of action vests in the consignor. (2.) When in the consignee. (3.) When in other parties. (4.) When title to the goods is involved and determines the right of action; and, (5.) The facts which transfer the right of action from one to the other or rather which vests the right in ~~one~~ or the

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other of several parties. The present action is believed to be in accordance with the views of Chitty, Kent, and Redfield. 1 Ch. Pl. 6, 7; 2 Kent (11th ed.), 1867; Lecture 39, p. 499, 500; 2 Redf. L. of R. 170-172, and *Sheets v. Wilgus*, 56 Barb. 662.

The Frances, 9 Cranch, 183, was a petition for the restitution of goods captured during the war of 1812. The question was, whether the title to the goods was in the English or American merchant, upon which depended the right to restitution.

The Mary and Susan, 1 Wheat. 25, was precisely like the case of *The Frances*.

Grove v. Brien, 8 How. 429, was a contest between a creditor of the consignor and the consignee. The title was held to have vested in the consignee before the creditor interposed his claim.

Bonner v. Marsh, 10 S. & M. 876, like that of *Grove v. Brien*, was a contest between an attaching general creditor of a consignee of cotton, attached in transit, and the consignee also a creditor of the consignor. The court say of the case, that: "The true and only question is the question of title. Was it the property of McRae when the attachment was levied, or of Bonner, etc.? In other words, had there been a sale and delivery?" *Held*, there had not been a sale and delivery, and the attachment was sustained. Beyond this brief abstract, these cases need not be developed, as their bearing upon the question under discussion is too remote to influence the result.

Referring to the later and more direct authorities heretofore cited, it will be seen that this case is solved by its simple facts, and upon familiar principles. To explain and enforce this remark is the object of what follows, although, to some extent, at the expense of a repetition of preceding portions of this opinion.

At the request of Craft, the express company contracted to transport and deliver the packages to Duncan, at Bowling Green, the freight being paid in advance by Craft. Duncan does not object to the suit in Craft's name, for the best of reasons, to-wit: that he has been paid by Craft, and therefore has no claim on the company. The testimony of Duncan was taken in this cause, and he not only does not object to the action, but testifies that Craft has paid him. A judgment in this case is, therefore, doubly a bar in a suit by Duncan; not alone because, knowing of this action, he did not object to it, but because of his full indemnification by payment from Craft. The action in the name of Craft, and the result in the court below, are clearly in accordance with the highest authorities. But, even in the absence of the payment of Duncan by Craft, the former not objecting, this action would be sustained upon its

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intrinsic merits, without the support of the recent and enlightened precedents referred to, as the result merits the justice of the case.

It is true the payment of Duncan by Craft is a gratifying and contributory fact, but has no material influence in the determination of the cause. It serves this purpose, however, that it precludes all possibility of controversy between Craft and Duncan over the avails of the judgment, and renders more certain to the company that the judgment is a bar to further prosecution.

The action is brought upon the contract of the company with Craft, and is sustained expressly upon that basis. Hence, the question whether the money, when deposited with the company, became the property of Duncan, is not involved. If Craft had not already paid Duncan, the former would be presumed to be the agent or trustee of the latter and suing for his benefit, within the authorities cited.

Referring to other points made by counsel, it may be remarked that it is not deemed necessary to determine under what circumstances the action might or ought to have been brought in the name of Duncan, nor, generally, when the consignee instead of the consignor is the rightful party in actions against carriers, for injuries to goods; nor yet, when such actions must be brought by the legal owner, beyond the instances furnished by the authorities.

The single proposition intended to be asserted by this adjudication is so happily stated by one of the earliest cases of this character on record, it will be here quoted for that purpose. Reference is made to *Davis v. Jones*, 5 Beon. 2680, which was an action against a common carrier by land, and was decided on the footing of an original contract. The case was before Lord MANSFIELD, who held that the defendants were liable for the consequences to the original consignors, whether the property was in them or not, because the carrier agreed with them to carry the goods safely, and the action was for the breach of that agreement. The doctrine announced in that case by Lord MANSFIELD is adopted and declared as the true rule in the case under consideration.

In contrast with *Davis v. Jones* is *Dawes v. Peck*, 8 T. R. 330, one of a class of cases where no bill of lading is usually given and where the party in whom the legal interest is vested is the rightful party to an action against a carrier. Lord KENYON stated that the owner of the goods is the proper party to an action against a carrier, because "he is the person who has sustained the loss by the negligence of the carrier, and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured." This case has served to mislead the profession in some instances, but it was a case of carriage by

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stage, where it is usual to pay the price of carriage on booking the goods, at the wagon office, without taking a bill of lading. *Daves v. Peck* was decided only a few years later than *Davis v. Jones*, and as the one served to express the rule in the case at bar, the other is given as a most apt illustration of a case where the right of action against a carrier for injuries to goods devolves on the person having the legal interest therein.

The questions herein discussed being of first impression in this State, and of growing practical interest, it is believed the attention bestowed upon them will not prove without value. In addition to the authorities heretofore cited, the following have been consulted, and are appended for the convenience of future investigation: *Green v. Olark*, 13 Barb. 57; *Sandford v. H. Railway*, 11 Cush. 155; *Arbuckle v. Thompson*, 37 Penn. St. 170; *Elkins v. B. and M. Railway*, 19 N. A. 337; *White v. Bascom*, 28 Vt. 268; *Wing v. N. Y. and E. Railway*, 1 Hilt. 235; *Ill. Cent. Railway v. Cowles*, 32 Ill. 110; *Creery v. Holly*, 14 Wend. 26; *Covill v. Hill*, 4 Denio, 330; *Merian v. Funck*, id. 110; *Wolfe v. Myers*, 3 Sandf. 7; *Greenl. Ev.*, § 305; 3 B. & Ad. 523; 9 Yerg. 446; 1 Ld. Raym. 271; *Alfridson v. Ladd*, 12 Mass. 173; *Stackpole v. Arnold*, 11 id. 29; *Buffum v. Chadwick*, 8 id. 103; *VanStaphorst v. Pearce*, 4 id. 263; *Savage v. Rix*, 9 N. H. 269; *Story on Agency*, §§ 155, 160, 396; *Doe v. Thompson*, 2 Porter, 217; 1 Am. Lead. Cas. (1st ed.) 460; *Clap v. Day*, 2 Greenl. 307; *Com. Bank v. French*, 21 Pick. 486; 1 H. Bl. 81; *Paley on Agency*, ch. 5; *Addison on Cout.* 782; *Angell on Carriers*, § 367; 10 Watts, 384; *Abbot on Shipping* (7th ed.) 319; 3 Mod. 321; 8 T. R. 531; 11 Mass. 72; 1 B. & Ald. 575; 7 Cow. 670; 1 H. Bl. 359; *Davis v. James*, 5 Bur. 2680; 8 T. R. 330; 13 East. 399; 1 T. R. 659; 4 Ad. & El. N. R. 260; 1 Camp. 369; *Thompson v. Dominy*, 14 M. & W. 403; 17 Johns. 23; 6 Ad. & El. 486; 5 B. & Ad. 393; 12 Barb. 810, etc.

Judgment affirmed.

NOTE.—See *Krudler v. Ellison*, 7 Am. Rep. 402; *Thompson v. Fargo*, 10 id. 342; *Burroughs v. Norwich, etc. R. R. Co.*, 1 id. 78; *Ralph v. Chicago & Co. R. R. Co.*, 14 id. 725; *Finn v. Western R. R. Co.*, 17 id. 128.—REP.

THOMPSON v. N. O., J. & G. N. R. R. Co.

(50 Miss. 315.)

Carrier of passengers—obligation to carry and set down at destination. Damages. Plaintiff entered defendants' cars and paid his fare to B. The train did not stop there, but ran by two miles to a water-tank. Plaintiff demanded that the train should return to B. but the conductor gave him the option to ride to the next station and return to

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B by the first train free of charge or to leave the train at the tank. He chose the first alternative and thus reached B after some three hours' delay. Plaintiff sustained no bodily injury, mental suffering, insult, oppression, or pecuniary loss. *Held*, that the plaintiff had a cause of action against the defendants for failing to set him down at B, but that he could not recover punitive damages.

ACTION to recover damages. The opinion states the case.

Cassidy & Stockdale, for plaintiff in error.

Harris & George, for defendants in error.

TARBELL, J. About November 16, 1870, Thompson went on board the cars of N. O., J. & G. N. R. R. Co., and paid his fare to Boguichitto. The train, however, did not stop at the station, but ran past about two miles, stopping at a water tank. Thompson demanded of the conductor that the train should be backed to the station at Boguichitto, but the conductor said the train could not be backed. He was courteous and polite; expressed regrets; said the blame attached to the engineer, who had been contrary all day; and submitted the option to Thompson to ride to the next station, with transportation back by the first train free of charge, or of leaving the train at the tank, where it then was. The offer of a free ride Thompson accepted. The train on which he returned ran beyond the station at Boguichitto, and landed him about 150 yards therefrom, the train slackening its speed, and he voluntarily jumped off while it was in motion, without injury. Thompson had with him a roll of bagging, on which he paid no freight. The mail trains were not in the habit of stopping at Boguichitto, but sometimes did so. Thompson got on board the train at Brookhaven about dusk, and was landed at Boguichitto about midnight, being delayed some two or three hours. Upon this state of facts, Thompson instituted this action against the company to recover damages. He testified on the trial that he "could not say that he was pecuniarily damaged one cent." No complaint is made of the conductors or other officers of the road, that they were guilty of any acts of rudeness, discourtesy or oppression; but it appears they were affable, and offered apologies for carrying Thompson by the station to which he was destined.

There was a demurrer to the evidence of the plaintiff, in which the plaintiff joined.

The court sustained the demurrer and dismissed the plaintiff's suit. Thereupon Thompson prosecuted a writ of error.

It is insisted in behalf of the plaintiff in error, that upon the facts, the right of action is absolute and complete. And counsel press the distinction between this right and the amount of damages which may be as-

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essed by the jury. On the other hand, it is urged that this is, on its face, a speculative prosecution, and ought not to be sustained by the courts.

In *Heirn v. McCaughan*, 32 Miss. 17, the suit was by the husband and wife, against a common carrier by water, to recover damages for the neglect of the carrier's steamer to call for passengers at Pascagoula. The wife was in delicate health. They were exposed on the pier-head at Pascagoula from sundown at night until sunrise in the morning, during exceedingly uncomfortable and perilous weather. So intense was the cold, that McCaughan, to protect his wife, was compelled to surrender to her the use of his coat, and to remain through the night in his shirt sleeves.

Thompson, in the case at bar, makes no complaint of mental or bodily suffering, nor of danger from exposure to the weather or otherwise.

The case of *The N. O., J. & G. N. R. R. Co. v. Hurst*, 36 Miss. 660, was based on insult and compulsion on the part of the conductor. Nothing of the kind appears in the case at bar.

M. & O. R. R. Co. v. McArthur, 43 Miss. 180, was like the one at bar to the extent only of a demurrer to the evidence. The recovery in the case cited rested on the fact that the plaintiff was carried five miles beyond the station at which he ought to have been landed, walking back to his proper station in the rain, arriving there between 12 and 1 o'clock at night, and that he was subject to chronic rheumatism. The case is, therefore, unlike the one at bar.

Between this case and that of *The M. & C. R. R. Co. v. Whitfield*, 44 Miss. 466, there is this difference, that the train ran several hundred yards past the station where Mr. Whitfield should have been deposited, and he was compelled to get out at a place wet and slippery, and in alighting without assistance, fell and seriously injured his knees.

And in *S. R. R. Co. v. Kendrick and wife*, 40 Miss. 374, the action was to recover damages against the company for carrying Mrs. Kendrick a mile or two beyond her destination, setting her down in the night at a lonely, solitary point of the road, whence, in the care of two strange laborers, she had to walk over dangerous bridges and through woods, back to her home. The conductor offered to take her on until he should meet the return train when he would pass her home free of charge, but this she declined. It will be observed of these cases, that the point specially litigated is as to the recovery of exemplary damages, while, in the case at bar, the question is, was the right of action, without reference to damages, complete, when the train failed to set the party down at Boguichitto, and the conductor gave him his option to get down at the tank or be taken to the next station and returned free of charge? In choosing to accept the

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alternative of a free ride to the next station and back to Boguichitto, did he thereby waive or compromise his right of action?

The court say in *S. R. R. Co. v. Kendrick et ux.*, *supra*, that "by the fifth instruction the court instructed the jury, that in actions of tort against common carriers, special damage need not be proved. This was improper, because it was indefinite, and calculated to mislead the jury. If it be understood as holding, that when there appears, by the evidence, to be negligence in the carrier to the wrong of the plaintiff, in such a case the plaintiff is entitled to recover nominal damages without proof of special damage; to that extent the rule was correct. But if it be taken to hold, that when the carrier has been guilty of negligence, the plaintiff may recover special or exemplary damages without any evidence tending to show circumstances of special injury or wrong, it was error."

And this is undoubtedly the correct rule, and by which the case at bar must be determined. There is no bodily injury, mental suffering, insult, oppression, or pecuniary loss shown, indeed, these concomitants of damage are disclaimed. Yet, the railroad company failed in its obligations, when the train neglected to deliver its passenger at Boguichitto, and the option to him to get down at the tank or ride to the next station and return was necessarily a compulsory choice. Upon the evidence, the plaintiff acquired a technical right of recovery, but the rule as to punitive damages does not apply. Hence, although the damages are only nominal, nevertheless, the cause of action ought to have been sustained, and a writ of inquiry awarded, to be executed under the appropriate directions of the court in such a case, as to which, *vide* 2 Redf. L. of Railways, 220 *et seq.*; S. & R. 646 *et seq.*; Sedgwick, 90, 128, note, 418, note, 665, note.

Ordered accordingly. Code, § 413.

TURNIPSEED V. HUDSON.

(50 Miss. 429.)

Office — abandonment of. Estoppel.

Plaintiff was elected to an office in 1871 for the term of four years. In 1873 an act was passed providing for an election in November of that year to fill said office. Among the candidates for such election were the plaintiff and the defendant, who entered into an agreement in writing to abide the result of a primary election. At the primary election the defendant was selected and in November he was elected and thereupon qualified and took possession of the office, plaintiff surrendering the same. The statute was afterward decided to be unconstitutional and the election void, and plaintiff brought

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sult to recover possession of the office. *Held*, (1) that the plaintiff was not estopped by the agreement with defendant; (2) that such agreement and the surrender of the office by plaintiff did not amount to an abandonment or resignation.

ACTION in the nature of *quo warranto* to determine the right of the defendant Hudson to the office of chancery clerk of Winston county. The facts are fully set forth in the opinion.

W. L. Nugent, for plaintiff in error.

A. H. Handy and *R. G. Rives*, for defendant in error.

TARBELL, J. This is a contest to determine the right to the office of chancery clerk of Winston county. Turnipseed was elected to the office in 1871, for the full term of four years. Hudson was elected to the same office in November, 1873, under the act of April 21 of that year. The act referred to having been declared unconstitutional, and the election thereunder null and void, the right of Hudson rests upon statements contained in his fifth plea to the information filed by Turnipseed. The material averments of that plea are these: That in accordance with an act of the legislature of the State of Mississippi, approved the 21st day of April, A. D. 1873, an election was duly ordered to be held in the county of Winston, on the first Tuesday after the first Monday in November, 1873, for the office of clerk of the chancery court of said county, and that prior to said election and while the said Turnipseed was in the possession of the office, he, Turnipseed, Hudson and others became candidates for said office at said election, and in the month of August prior thereto, entered into an agreement with each other, in writing, by which each pledged his sacred honor to abide the decision of a primary election to be held on the second Tuesday in September, for the purpose of determining to which of said candidates the other should yield his vote, influence and support for the said office; that at the primary election Hudson was selected as the candidate, and thus became entitled by the agreement to the vote, influence and support of Turnipseed for the said office; that at the election in November, Turnipseed cast his vote for Hudson; that Hudson was declared duly elected by the proper authorities; that he took the oath of office and executed the bond required by law; that on the first Monday in January, 1874, Turnipseed voluntarily and of his own accord, without demand of Hudson, delivered to him the keys of the office, together with the books, papers, records and furniture belonging thereto; since which time Turnipseed has wholly neglected to perform the duties of the office; and that said duties have been discharged by Hudson, who has claimed to act in his own right, with the full knowl-

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edge and consent of Turnipseed. Upon the judgment of this court pronouncing the act for the election of chancery clerks and others in 1873, unconstitutional and the election thereunder void, this proceeding was instituted. The testimony is quite voluminous, much of which is wholly immaterial. On the part of Turnipseed it was contended and positively stated in the evidence, that on surrendering the office to Hudson, he did so upon the understanding, mutually assented to, that his retirement was subject to the decision of the Supreme Court upon the statute under which Hudson was elected; that is, if the law directing the election should be declared unconstitutional, then he, Turnipseed, would reclaim the office; but that these declarations were made to Hudson and that they were acceded to by him, are as positively denied on his part by himself and his witnesses. The Circuit Court held adversely to the relator on the law and the facts, whereupon the latter prosecuted a writ of error.

There were several pleas, replications and demurrers by both parties, which were acted upon by the court below. It is now sought to base error upon the action of that court in this regard, and it is urged that certain of the demurrers ought to have been extended to the information; but the merits of this case are fully presented in the record; they could not be more clearly exhibited upon another or any number of trials; and no question of pleading or other technical point of any practical importance is conceived to be involved. On the contrary, the case is one as is believed, calling for a decision on its merits.

The propriety of this course is confirmed, from the fact that estoppel *in pais* depends upon the evidence and not upon the pleadings. *Herman on Estoppel*, 560; *Bigelow on Estoppel*, 590, and cases cited in notes; *Alexander v. Walter*, 8 Gill, 240, the latter being an action of ejectment, in which it was held that matter of estoppel *in pais* was the subject of evidence and not of plea.

It is considered, therefore, that the second cause assigned for error only need be discussed, viz.: that "the court erred in deciding the issue of law and fact for the defendant, and in dismissing the petition."

In view of the unconstitutionality of the act of April 21, 1873, and of the illegality of the election thereunder, the respondent is without right or defense, unless, (1.) He can invoke the doctrine of estoppel; or (2.) Unless there is a vacancy in the office in dispute, caused by the acts of the relator, whereby he has forfeited his title thereto.

If there is an estoppel it cannot be by judgment or record of adjudication, nor by matter of deed; but must be by matter *in pais*, of which estoppel *by conduct* is the key. *Bigelow on Estoppel*, 473. After a full

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discussion of the subject, this author says all of the following elements must be present in order to an estoppel by conduct :

1. There must have been a *representation* or a *concealment* of material facts.

2. The representation must have been made with *knowledge* of the facts.

3. The party to whom it was made must have been *ignorant of the truth* of the matter.

4. It must have been made with the *intention* that the other party should act upon it.

5. The other party must have been *induced to act upon it*. Id. 480.

In the case at bar, there has been no *representation* or *concealment* on the part of the relator ; there has been no *ignorance* on the part of the respondent ; nor has the latter been *induced* to act, to take any step, or to change his position or conduct in any respect whatever, in consequence of any thing said or done, or withheld by the relator. On the contrary, both these parties were deluded or impelled by the act of the legislature ordering an election. The record discloses an active public sentiment in favor of a pledge on the part of the several candidates for the office of chancery clerk to abide the vote of a primary or nominating election. To this sentiment the relator evidently yielded with reluctance. The signature of the relator to the pledge, however, had no influence whatever on the conduct of the respondent ; for, in testifying on his own behalf, he says he preferred that the relator should not sign it, as that action by Turnipseed, in the opinion of Hudson, would have contributed to the success of the latter. He further testifies that he notified the relator that he was a "standing candidate" for the office in controversy, substantially, at every opportunity and on all occasions, until he should succeed. Hudson and several of his friends were active and vigilant in their movements and operations to secure the position to him, uninfluenced by any word or act on the part of Turnipseed, as Hudson was a candidate whether Turnipseed did or did not subscribe to the pledge, which was evidently but a means to an end, and not the production or the suggestion of the relator. Hudson testifies in the most positive language, that he had no understanding or agreement whatever with Turnipseed beyond that contained in the pledge subscribed by all the candidates. That pledge, like all others of the kind, was a part of the political canvass, intended to work out, for some one of those subscribing it, induction to an office. It was a part of the complication of party politics by which a certain result was designed ; an operation of doubtful policy, as its effect can only be to limit and restrict the choice of the people at the

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polls. It narrows their choice by political management to a single candidate, whereas in our form of government it is desirable that candidacy should be as untrammelled and as free as our institutions. Independently of this view, however, the pledge in this case, according to the testimony of the respondent, had no influence on his action, one way or the other, and this is utterly fatal to the theory of an estoppel. On this point all the authorities cited by counsel, and all others accessible, have been carefully examined. *Alexander v. Walter*, 8 Gill, 239 ; 2 Story's Eq. Jur., § 1546 ; and others.

The doctrine under discussion is stated with rare terseness in *Dezell v. Odell*, 3 Hill, 215. Goods were seized under an execution and delivered to the defendant, upon his receipt, stipulating to redeliver them to the officer. The receipt was ruled to be an estoppel in an action by the officer against the receiptor. The court say : " We have the clear case of an admission by the defendant, intended to influence the conduct of the man with whom he was dealing, and actually leading him into a line of conduct which must be prejudicial to his interests, unless the defendant be cut off from the power of retraction. This is the very definition of an estoppel *in pais*. For the prevention of fraud, the law holds the admission to be conclusive."

And the doctrine is also briefly and accurately stated in *Taylor v. Zepp*, 11 Mo. 482. To establish estoppel *in pais*, the court say there must be : 1. An admission inconsistent with the evidence offered to be given, or the claim offered to be set up. 2. Action by the other party upon such admission. 3. Injury to him by allowing the claim to be disproved.

For the purpose of testing the case before this court, the respondent's statement of it may be accepted as embracing the case presented for adjudication. According to his own testimony in the cause, there was no admission, statement or act by the relator which was intended to or which did in fact influence his conduct. They were not dealing together, but were acting independently, if we accept the case made by the latter. Hence, there was no fraud, at least, on the part of the relator toward the respondent, for the latter was not governed in his line of conduct or influenced by any act of the former. On the contrary, taking the whole record together, it is palpable that the relator, rather than the respondent, was led into a line of conduct prejudicial to his interests by the act of the legislature and by the manipulations of active partisans. Within all the authorities—Bigelow on Estoppel, ch. 19 ; Herman's Law of Estoppel, § 442 ; *id.*, ch. 12, and cases cited by these authors ; also, cases cited in *Phillips v. Cooper*, 50 Miss. 722,—the pledge and the surrender are open to denial and explanation, and the case is without a single element of estoppel.

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It has been urged that it is ungracious in the relator to seek to evade the pledge. With reference to this fact, it has been observed that, in limiting the number of candidates to be voted for at the regular election, it had served its purpose. It may be further remarked that, if the case made by the respondent be alone accepted, the attempt to interpose the pledge to defeat the relator comes with an ill grace from the former, whose conduct, he testifies, was wholly independent of the course of the relator. But it is on the ground of public policy that the acts of the relator, set forth in the record, shall not be allowed to change the tenure of an important public office, and not upon any ground between the parties *Holman v. Johnson*, Cowper, 343.

There is another view of this pledge quite as conclusive against the theory of the respondent, as the suggestions already made, viz.: that it is contract or promise of future action, and not a "representation," such as enters into or constitutes an element in the law of estoppel. At most, it is but the expression of a present intention, which the party is at liberty to change. If an action on this agreement were instituted by Hudson for the recovery of damages for nonperformance, the obstacles and result may be anticipated without suggestion. Bigelow on Estoppel, 481; *Langdon v. Doud*, 10 Allen, 433; *Howard v. Hudson*, 2 El. & B. 1; *Audenried v. Bitteby*, 5 Allen, 382; *Plumer v. Lord* 9 id. 455; *Jorden v. Money*, 5 H. L. Cas. 185; *White v. Walker*, 31 Ill. 422; *Harris v. Brooks*, 21 Pick. 195.

Reference is made to *Colton v. Beardsley*, as stated in Bigelow on Estoppel. As therein presented, p. 522, that case is almost conclusive of the theory of respondent, but its examination in the reports (38 N. Y. 29) shows it to possess no feature like the case at bar. The action was trover against school trustees for the taking and conversion of certain property. The plaintiff, to prove his case, gave in evidence two warrants for the collection of taxes for school purposes, issued by the defendants, under which the collector seized and sold the property of plaintiff. On cross-examination the defendants asked the plaintiff's first witness if, at the several dates of the warrants, they were not acting trustees. The question was objected to, on the ground that the defendants could not show themselves trustees by reputation, or by proving their own acts. The objection was sustained, when the defendants presented the records of the school district, upon the face of which the question arose whether Colton, instead of Beardsley, was not a member of the board of trustees. Colton was elected trustee in 1854, for the term of three years. Prior to the expiration of this time, and in 1857, Beardsley was elected in place of Colton, on the ground of a vacancy, by the neglect or refusal of the

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latter to serve. He had never signified his acceptance, nor discharged the duties of the office ; was present at the meeting of the inhabitants of the district, when Beardsley was elected in his place, as in case of a vacancy ; and knew that B. entered upon the duties of the office, without interposing any objection or claim in his own behalf. The statute of New York, bearing upon the case, declares that a vacancy in the office of trustee may be occasioned by death, *refusal to serve*, removal, etc. The evidence to show that Colton was trustee was simply his election and residence in the district. It was not pretended that he accepted or served. Hence a vacancy within the letter of the statute. The case was decided by three of the four judges composing the court, and opinions by each of the three, two concurring in the judgment rendered, and the third dissenting. The points of concurrence between the two concurring judges it is not altogether easy to determine, but it is believed that the only essential point of agreement is in this, that the trustees had made out a *prima facie* defense, which required proof to overcome. They had offered to establish their official character by reputation, and acts, as such, extending through a period of several months. This evidence was rejected, and on this ground the judgment of the Circuit Court, wherein the plaintiff recovered, was reversed and a new trial awarded. The dissenting judge was of the opinion that the trustees should show themselves such *de jure*, which he insists was the only question for determination. With reference to the doctrine of estoppel, one of the two judges on whose concurrence the rulings on the trial were reversed, makes these remarks only : " Again, were it necessary, the plaintiff should be held estopped from denying the defendant's title to the office. He was present at their election, remained silent when the office was being filled, as vacant, made no objection when it was filled, and without objection saw the defendants enter upon the duties and assume the responsibilities in said office, himself neglecting to act in his, now claimed, official character."

The other concurring judge merely says : " It is unnecessary to inquire whether his acts do not amount to an estoppel, to his alleging that his office was not then vacant ; although my impression is that it should have that effect."

That was an election under a valid and subsisting statute, which declares a vacancy upon a refusal to serve, in which case the remaining trustees can convene the inhabitants, who, when assembled, are empowered to fill vacancies. In that case, the person first elected, after wholly neglecting to accept the office or to discharge its duties, attending the meeting, when his place was filled, as in case of vacancy, he, remaining silent, and without objection, saw his successor qualify and enter upon

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the duties of the office, which were performed by the latter for several months, and until the plaintiff's property was seized and sold for taxes, before any question was raised as to the legality of the second election. Colton then sought to contest the right to the office in the action which he instituted for the cause already stated. This was held by the concurring judges an attempt to attack title to an office in a collateral proceeding, which they also agreed could not be done. Upon this point the same dissenting judge was of the opinion that title to the office was directly in issue, and to justify, the defendants must show themselves trustees *de jure*. The majority held they had shown themselves *prima facie* trustees *de jure*.

It may be repeated that there was no evidence offered to show that Colton ever accepted or served; there was evidence of his refusal to serve within the statute creating a vacancy; no proof was offered to show that Beardsley was not elected to an actual vacancy; there was only proof of Colton's election nearly three years prior to the election of Beardsley to his place, as in case of vacancy, and his residence in the district; there was an election to fill his place as in case of vacancy by his refusal to serve; he was present at the meeting, unobjecting; permitted his successor to qualify and assume the office; and only objected several months thereafter, when his property was seized and sold by the school district tax-collector, under warrants signed by the several trustees, including the trustees chosen as his successor. The Circuit Court ruled that, *prima facie*, there was no vacancy, and that the trustees must show they were such *de jure*.

The appellate court held that, *prima facie*, there was a vacancy, and that, *prima facie*, also, Beardsley was trustee, and further, that official character may be established, *prima facie*, by oath and reputation, upon which grounds, the judgment of the Circuit Court was reversed.

Two points of concurrence in that case may be added by way of further showing its clear contrast with the case at bar. 1. It was held that, under the statutes of New York, regulating affairs of school districts, the trustees and the inhabitants, when convened in school district meeting, were invested with power, in their judgment and discretion, to determine whether there was a vacancy, as in that case, and that said determination was final until reversed or set aside by a direct proceeding for that purpose. 2. That a refusal to serve, whereby, under their statute, a vacancy was created, was clearly shown; that the inhabitants of the district so understood and acted upon it, and that the plaintiff's presence at the filling of the vacancy, and subsequent conduct, approved their understanding and ratified their acts.

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Thus much time and space have been given to the cases of *Colton v. Beardsley*, because of the very erroneous impression conveyed by the statement of it in Bigelow on Estoppel, with a view to show its want of analogy to the case at bar.

Another case cited by counsel, *Regina v. Greene*, 2 Q. B. 460, ought, perhaps, to be briefly noticed. Search has been made in the report, but it can be found only as given in Bigelow, 565, and Herman, 535. That was a motion for a *quo warranto* against the defendant for exercising the office of councillor when disqualified by the statute. His election was under a valid and subsisting law. The relator was well acquainted with the intention of the defendant to become a candidate; he was present when the defendant was elected and acquiesced in his election; the election was declared and published; no notice of the disqualification was given at the time of the election or publication; in fact, the relator was chairman of the meeting at which the defendant was appointed to office, and administered to him the oath of office or declaration required by law. The court very properly held, as far as can be judged from the statement of the case by Mr. Bigelow, that the relator could not be heard to question the right of the defendant. The court make the significant suggestion of a distinction between a judicial and a ministerial act in the induction of another into office. The relator, in administering the declaration to the defendant, by which the latter was inducted into office, acted judicially, whereas, if he had acted ministerially, the court say, the case would have been otherwise decided.

Mr. Herman, in his work on the law of Estoppel, gives three or four lines to the foregoing case only. According to this author, the defendant was "induced" to take the office and was inducted into it by the relator, who, in so doing, acted in his official and judicial character. As referred to by these text-writers, therefore, the case is not analogous to the one under consideration.

Another branch of the case before this court will now be discussed.

It is correctly urged, that the relator must recover, if at all, upon the strength of his own title, and not upon the weakness of the claim of his adversary. *Kimball v. Alcorn*, 45 Miss. 151.

And, in this connection, it is insisted, that the pledge and the surrender were equivalent to a resignation, or an abandonment of the office. It is apparent, from the authorities, that, had the board of supervisors of Winston county found, in fact, a vacancy upon a hearing, after notice to the relator; had the board thereupon ordered an election to fill the vacancy; if such election had been held; had the person, thus elected, qualified and assumed the duties of the office, Turnipseed permitting all

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this to be done without objection or the interposition of any claim; and were this contest between him and the person thus holding the office, quite another and different case would have been presented for adjudication. Such a case would have borne a very strong similarity to that of *Colton v. Beardsley*, otherwise wholly unlike the one at bar.

As to the pledge signed by the several candidates, it must be held to have very little if any weight in the disposition of the case. It was but the machinery of a political party to bring about, in its own way, the nomination of a candidate for support at the regular election. To this extent, it may, perhaps, be unobjectionable; but beyond this primary purpose, it ought not to have recognition. Its introduction to control the right to an elective office is a use for which it was never designed. At least, beyond this, it ought not to have legal countenance. As a means of effecting the tenure of public offices, it must be regarded as impolitic. If an office may be transferred from one to another in the mode attempted, no elucidation is necessary to expose the evils which might flow from repeated changes, which the sanction of the claim of the respondent, to the extent required, would render possible. *Butts v. Wood*, 37 N. Y. 317; *Gray v. Hook*, 4 id. 449; 3 Kent's Com., § 588, top p., 11th ed, part 6, sec. LII, "Of Offices," *et seq.*

Were the acts of Turnipseed, including the pledge and surrender, tantamount to a resignation? Did those acts create a vacancy in the office in controversy? Was there in fact or in law a vacancy?

The provisions of the Code, bearing on these questions, are these:

"§ 292. If any State or county officer shall be found, by inquest, to be an idiot, lunatic, or unsound in mind, during the period for which he is elected, or shall, during that time, be found guilty of felony, or any infamous crime, corruption, or peculation in office, or gambling with money which may have come into his hands by virtue of his office, or shall be removed from office by sentence of any court of competent jurisdiction, the office held by such person shall be thereby vacated, and the vacancy shall be supplied as by law directed."

"§ 393. If any State, district, or county officer shall remove out of the State, district, or county, for which he was elected, during the term of his office, such office shall thereby become vacant, and the vacancy shall be supplied as by law directed." * *

If the Code declares a vacancy in office for any other cause, the section has been overlooked.

§ 1363 gives to the board of supervisors power, and it is made their duty to "order elections to fill vacancies that may occur in any of the offices of their respective counties."

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In *Johnston v. Wilson*, 2 N. H. 202, a vacancy was held to be created by neglect to take the oath of office, and an absolute refusal to perform its duties, except upon terms indicated by the officer and not acceded to by the proper authorities. The court, however, say: "It must be obvious, also, that when once accepted, no vacancy can be said to exist in the office, till the term of service expire, or till the death, removal or resignation of the person appointed." And the terms *resignation* and *non acceptance* are employed as synonymous, the court saying: "The term used to express a vacancy was immaterial."

Cummings v. Clark, 15 Vt. 653, presented two questions: 1. Whether the refusal of a highway surveyor to execute a receipt for a tax bill offered to him for collection by the selectmen is *ipso facto* a vacating of the office. 2. Had the selectmen a judicial discretion in determining when they might make a new appointment?

To the first question the court reply: "Such refusal is, at most, the omission by such officer of a prescribed duty. The statute does not, in terms, visit any such consequences as that contended for, upon the act complained of. To give it that effect by construction, would be to adopt a principle which, in practice, would render it necessary to fill most offices many times over, before the legal time appointed for a new election by the people."

With reference to the second question, it is said: "The selectmen doubtless, to some extent, had a discretion in the matter; for instance, in selecting a suitable person to fill any vacancy which might occur. But we think a vacancy must have occurred, in order to give them any jurisdiction of the matter. This vacancy must have occurred in one of the modes pointed out in the statute; 'from nonacceptance, death, removal, insanity, or other disability.' Now it cannot be contended that the present case comes under any of the terms used, unless it be the last, and it would seem to require argument to show that the omission complained of in this case constitutes no disability to perform the functions of the office, in any such sense as that term is used in the statute. 'Other disability,' must import such like disability as had been before enumerated; that is, such as wholly vacated the office and left it the same as if there had been no appointment. In the present case no such vacancy had occurred, and by consequence, the selectmen had no power to make an appointment, and their proceedings are irregular and void."

The rule stated in *The People v. Carrique*, 2 Hill, 97, quoting *Angel & Ames on Corp.*, is, that a resignation by implication may take place by being appointed to and accepting a new office incompatible with the former one. See, also, 3 Burr. 1616, and 2 T. R. 87.

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It was declared in *Cornwell v. Allen*, 21 Ind. 522, that a temporary disability to discharge the duties of the office, might not, of itself, create a vacancy, but that a disability designed to continue for the whole term of office must vacate the office. In that case, the party enlisted in the army of the United States for three years, or during the late war. *Held*, a vacancy was created, because the person, by his enlistment, entered into an engagement to leave the county and State for three years, covering the full term of office.

The case of *Kiel v. Baird*, 47 Mo. 303, was this: K. was elected treasurer of the county of Cooper in 1868, for the term of two years; he duly qualified and assumed the duties of the office; thereafter an information was filed in the County Court of that county, in which petition it was averred that K. had been unable to attend to the duties of his office for a period of fifty days; on which information the County Court proceeded *ex parte* to inquire into the case, and as a result of such examination declared the office vacant; whereupon the court appointed B. to the office. The court say: "Where is the legal warrant for these proceedings? We are referred to the statute, which provides as follows: 'In case of vacancy in the office of treasurer by death, resignation, removal or otherwise, it shall be duty of the County Court of the proper county to fill such vacancy by appointment.' This statute authorizes the County Court to fill an existing vacancy, but confers upon the court no power to create the vacancy it is to supply. The statute cited confers no jurisdiction upon the County Court to act in the premises until a vacancy actually exists. The pleadings show that there was no vacancy in the office at the time the court assumed to act. The complaint of the county attorney is, that the relator occupied the office, but neglected its duties. That is the substance of his averments."

While the constitution of Mississippi contemplates vacancies in office from various causes, it has been seen that the Code has made provision for vacancies in county offices, only by inquest in certain cases, conviction of a felony or other crimes enumerated, or by sentence of removal by a competent court, § 392, and by removal from the county, § 393. Nevertheless, vacancies may otherwise happen, and when they "occur," the board of supervisors may order an election to fill such vacancy. § 1363.

Did a vacancy "occur" in the office in controversy by the acts of the relator? Manifestly, the board of supervisors, as a matter of law, cannot, by adjudication, create a vacancy, though, as a question of fact, that body may inquire whether one exists or not. In this case it is a question of law upon the facts, to be determined by a competent tribunal. Although he delivered the office to the respondent, the relator did not

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remove from the county, nor did he otherwise render himself disabled or disqualified permanently, to discharge the duties of the office. As in the cases cited, there is a clear and just distinction between a penalty for the neglect of official duty, and a penalty involving the vacation of an office. *Spafford v. Hood*, 6 Cow. 478. To hold that the relator has vacated the office involved, would be contrary to a correct public policy, and to punish him for possessing a law abiding disposition, as indicated first, in yielding to the decree of the legislature, then in signing the pledge, and finally in a voluntary surrender, which was at the end of his term, according to the statute that for the time being commanded his obedience.

The true rule in a case like the one before the court would seem to be, that in order to create a vacancy, the party must permanently disable himself from performing the duties of the office, either by himself or deputy, or he must, by acts and declarations, manifest a clear intention to wilfully abandon the office and its duties—an intention not shown by the record.

Holding the order of the board of supervisors declaring a vacancy in the office in dispute, standing alone unacted upon, to be nugatory, this case is narrowed down to the single question, whether the delivery to the respondent was a resignation by implication, so as to create a vacancy. No determination on the part of the relator to abandon the office, in any sense of that term, within the authorities, is manifest. On the contrary, he did not desire to vacate. It is apparent that he was deluded by the unwise and illegal statute, and by the complications of the canvass, before which, he, perhaps, too readily yielded, but that he wilfully abandoned the office in any legal or proper sense of the term, or from a determination to vacate it because he did not wish to hold it, is a proposition wholly inconsistent with the record, unwarranted by the precedents, and absolutely the reverse of the intention of the relator. In view of this discussion, the case at bar may be summed up in this: that both these parties acted under a delusion caused by what proved to be an illegal statute and a void election; that Hudson acted upon no representation, expressed or concealed, of Turnipseed, but upon the statute referred to; and that the relator delivered the office to the respondent, not from a desire, purposely or wilfully, to abandon the office and its duties, but in obedience to a law of the legislature, approved by the governor, and its enforcement threatened by the local district attorney. When the act which has caused this litigation was declared unconstitutional, the relator demanded of the respondent a restoration of the office to which, upon the record and the authorities as they are understood, he

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was legally and equitably entitled. It would not be a sound public policy to permit parties to treat an office as a "mere toy" for "amusement, subject to be taken up, laid down and taken up again at will."

Judgment of the Circuit Court reversed and judgment final here.

SIMRALL, J., delivered a dissenting opinion.

CASES

IN THE

SUPREME COURT

OF

TEXAS.

GORMAN, appellant, v. THE STATE.

(38 Tex. 112.)

Bond — blank in.

A bail-bond described A B as principal, and was conditioned that whereas an indictment had been found against A B. "Now if the above bounden ——— shall make his personal appearance at the next term," etc., the bond to be void. *Held*, that the bond was good, notwithstanding the blank, and bound A B to appear.

ACTION on a bond. The opinion states the case.

Jones & Sayers, for appellant.

W. Alexander, Attorney-General, for appellees.

OGDEN, J. There is no error in the judgment of the District Court in this case. John Gorman, as principal, with others as sureties, entered into bond in the sum of \$200, conditioned that whereas an indictment had been preferred against John Gorman, etc. * * Now if the above bounden ——— shall make his personal appearance at the next term of the District Court, to be holden at the court-house in the town of Bastrop, on the fourth Monday in November, 1871, to answer said indictment, etc. It is contended that the blank in the condition after

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bounden vitiates the bond for uncertainty, but we do not so understand the force of the bond nor the requirements of the statute.

John Gorman was the principal in the bond ; he was the party indicted, and it is very clear that he was the defendant, and the one to answer to the indictment found against him, and if his name had been inserted in the blank it would not have made the conditions more certain or definite. The above bounden meant John Gorman, the defendant, and could, by no legitimate construction of the language or the law, have reference to any one else.

The judgment is affirmed.

Affirmed.

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(38 Tex. 504.)

Criminal Law — trial — jury of more than twelve men.

No legal verdict can be rendered in a criminal cause by a jury composed of more than twelve men.

If a jury of more than twelve men have been impaneled, and the last juror sworn can be pointed out during the trial, he may be dismissed from the panel and the trial proceed.

INDICTMENT for larceny.

Attorney-General, for the State.

WALKER, J. We need notice but one of the errors assigned for reversing this case.

The appellant was indicted for horse stealing in the District Court of Elkins county, and tried before a jury of thirteen men, convicted, and adjudged to suffer imprisonment in the penitentiary for the term of ten years. This is certainly a very novel irregularity in a Texas court. Article 3007, Paschal's Digest, declares that "the only mode of trial upon issues of fact in the District Court is by a jury of *twelve men*, except in certain cases otherwise provided for."

Similar cases have seldom occurred, but when they have occurred, the courts, in England and in the different States have expressed a diversity of opinion. In Mississippi a verdict of thirteen jurors was set aside.

Wolf et al. v. Martin, 1 How. 30. In *Tilman et al. v. Ailles*, 5 Smedes & Marsh. 378, the court refused to allow it as error, that the verdict

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was rendered by thirteen jurors, but state that if it had been rendered by a less number than twelve it would be void. In Kentucky the court held that the defendant being present, and not objecting when the jury was sworn, could not maintain it as error that the verdict was rendered by thirteen jurors. 5 B. Monr. 120. In *Ross v. Neal*, 7 Minn. 407, the court held the verdict void, if excepted to in the court below.

The English courts have allowed the last juror sworn to be discharged from the panel, and the trial to proceed, where the mistake is discovered before the jury retired to deliberate. But we think, under our law, there is no room for the courts to speculate upon such irregularity. If the fact is discovered before the verdict is rendered, the cause should be withdrawn from the jury, and a lawful jury impaneled and sworn to try it; or, if the last juror sworn can be pointed out, he may be dismissed from the panel, and the trial proceed before the legally constituted jury. But if more jurors than the legal number are permitted to deliberate on the verdict, the verdict should be set aside and a new trial awarded.

The judgment in this case is reversed and the cause remanded.

Reversed and remanded.

SMITH, appellant, v. GLANTON.

(39 Tex. 365.)

Usury — defense of, after repea. of laws.

In an action on a promissory note the defendant set up the defense of usury. *Held*, that the defense was good although the usury laws had been repealed after the action was brought.

ACTION by Glanton against Smith on a promissory note for \$800 executed June 6, 1860, and due one year from date. The defendant alleged that the note was usurious. It appeared that the usury laws of the State in force when this action was commenced were repealed by the State constitution subsequently adopted. The verdict and judgment were for the plaintiff, and the defendant appealed.

James H. Burts, for appellant.

N. P. Brewster, for appellee.

WALKER, J. It is possible his honor the district judge may have applied to this case the provision contained in the 44th section of the 12th article of the constitution.

Ex parte Ezell.

Respect should, however, have been paid to the fact that this suit was commenced in May, 1867, long before the adoption of the present constitution.

The law applicable to this case, if, indeed, the contract was originally usurious, is contained in article 8942, Paschal's Digest. If a greater amount of interest than that allowed by law was contracted for, then the jury should have been instructed to apply the payments to the principal of the debt.

The plea of usury was a proper defense, and should have been admitted; and if the defendant had evidence to offer under it, he should have been permitted so to do.

No usurious contract is permitted to escape the vigilant inquest of a court of equity.

If the contract was originally usurious, no device can be permitted to cover it up, such as the taking of a new note, the payment of interest without credit, or any other scheme or contrivance of the parties to blind the eye of the law.

The inquiry, under a proper defense, may always be made; and so long as any portion of the debt remains unpaid, the statute of limitations will not cut off the right of a party who has paid usurious interest to recover it back.

The judgment of the District Court is reversed and the cause remanded.

Reversed and remanded.

EX PARTE EZEIL.

(40 Tex. 451.)

Constitutional law — bail, right to.

The constitution provided that "all prisoners shall be bailable upon sufficient sureties."

Held, that a statute denying bail to a prisoner after conviction, and pending an appeal was valid.

APPPLICATION for a writ of *habeas corpus*. The applicants were convicted of a felony after indictment and trial, and sentenced to imprisonment in the penitentiary.

They appealed from the conviction and judgment, and pending the appeal applied to be bailed, which was refused, whereupon they applied upon these facts and those stated in the opinion, for a writ of *habeas corpus*.

Ex parte Ezell.

D. E. Thomas and Terrell & Walker, for relators.

George Clark, Attorney-General, for the State.

ROBERTS, C. J. The Code of Criminal Procedure provides, that "when the defendant appeals in any case of felony, he shall be committed to jail until the decision of the Supreme Court can be made."

The applicants having been convicted of a felony in the District Court and taken an appeal to this court, contend that they are entitled to bail in contravention to the law, because it is in conflict with that part of our Bill of Rights in the constitution which says that "all prisoners shall be bailable upon sufficient sureties, unless for capital offenses when the proof is evident; but this provision shall not be so construed as to prohibit bail after indictment found, upon an examination of the evidence by a judge of the Supreme or District Court, upon the return of the writ of *habeas corpus*, returnable in the county where the offense is committed."

After a full consideration of the subject, we are not prepared to say that the legislature has not the power to pass such a law. Although the terms "all prisoners" are used, it is evident that it was not meant to require all prisoners under all circumstances to be bailed, but must refer to a class of prisoners, each and all of whom shall be bailed except as therein provided. There are several considerations leading pertinently to the conclusion that prisoners before trial and conviction in the District Court were those alone who were designed to be secured this absolute constitutional right of bail.

The District Court is the tribunal provided by the constitution for the trial and conviction of persons charged with offenses amounting to felonies. The same instrument secures them the right of appeal from the judgment of conviction to the Supreme Court. That appeal, however, does not bring the party before this court for a trial *de novo*; it merely suspends the judgment of the court below until this court can revise and pass judgment upon the correctness of the proceedings of the District Court in the trial of the cause.

This appeal for revision is a discretionary privilege, of which the party convicted can avail himself or not, as he pleases.

The constitution secures to him this privilege, but does not prescribe the mode or manner of obtaining it. By a necessary implication, the duty is cast upon the legislature of making such regulations in securing this appellate revision of his conviction as will reasonably attain the object for his benefit, and at the same time secure a reasonable certainty of his punishment, in the event his conviction shall be pronounced by

the appellate court, upon revision thereof, to have been correct. These regulations properly embrace not only the various steps to be taken in presenting the subject-matter of revision to this court, but also the security of his person to abide the decision.

The Legislature, therefore, is under an obligation to the party and to the public, in the discharge of which the rights of both must be practically subserved. If the party should be bailed after conviction, punishment in the penitentiary would simply have its price, regulated generally by the amount of the recognizance, where one could be given at all. And if the amount should be increased so as to secure the appearance, it would most likely either prevent the giving of the bail, or would infringe upon another constitutional right which is covered by the expression that "excessive bail shall not be required."

It is not clear, then, that this is not a necessary and proper regulation in securing this right of appeal to a party convicted of a felony.

Another consideration arises out of the time and circumstances under which this law was enacted, and the long-continued tacit recognition of its propriety in forming constitutions during its existence and enforcement.

It was adopted as a part of our codes, in adapting our criminal laws to the penitentiary system. The constitution of 1845, then in force, contained this same clause in the Bill of Rights in reference to the right of bail, and it provided also for the right of appeal in criminal cases, "with such exceptions and under such regulations as the legislature shall make."

These two provisions construed together made it reasonably certain that the legislature had the power to pass this law, refusing bail to such prisoners after conviction.

In the constitutions of 1861 and of 1866 there was no material change in either of the provisions relating to the matter now under consideration. The constitution of 1869 contains the same clause in the Bill of Rights as to the right of bail, and a provision that "in criminal cases no appeal shall be allowed to the Supreme Court, unless some judge thereof shall, upon inspecting the transcript of the record, believe that some error of law has been committed by the judge before whom the cause was tried; *provided*, that said transcript of the record shall be presented within sixty days from the date of the trial, under such rules and regulations as may be prescribed by the legislature."

This important change in imposing onerous restrictions and limitations upon the right of appeal shows that the subject was considered by the convention, and that instead of enlarging the rights of the prisoner convicted, as they had previously existed, they sought rather to diminish them.

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By the late amendments of the constitution it is provided, that "the Supreme Court shall have appellate jurisdiction only, which in civil causes and criminal causes shall be co-extensive with the limits of the State." The main object of this change was to get rid of the limitations and restrictions on the right of appeal in regard to obtaining the leave of one of the judges of the Supreme Court, and had no reference to enlarging the rights of the prisoner as to bail after conviction; nor does it in effect, by omitting to expressly give the legislature the right to regulate the remedy by appeal, take away or destroy the implied obligation to make such regulations by law as may be necessary and proper to secure that remedy to the prisoner which has been done by the laws now in force. These provide for the manner in which the case shall be prepared and sent to this court; that the transcript may be sent to either of the places where the court is being held, and that it may be given a preference as to time of hearing on the docket, by which the prisoner is furnished speedy revision of his case, while he awaits in jail the decision of its correctness, as sought by him.

The fact that this law denying bail to the prisoner convicted of a felony while his appeal is pending has been in force ever since the 1st day of February, 1857, and has not been altered by the legislature during the many sessions since held, and has not been changed by the several conventions, whose members were perfectly familiar with its enforcement all over the State; that neither the bar nor bench have ever before this time called in question its constitutionality, though not conclusive, is a forcible argument in favor of the power of the legislature to make such a law.

The decisions upon this question have been different in different States. In the State of North Carolina, it was held by the Supreme Court that the clause in their Bill of Rights, similar to that in ours, did not confer the absolute right of bail to prisoners after conviction, and pending a writ of error to the Supreme Court. In that case the judge delivering the opinion (in which the court was unanimous) says: "I think that clause in the constitution which declares that all prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great, relates entirely to prisoners before conviction; for although the words, 'where the proof is evident or the presumption great,' relate to capital cases only — that is, to prisoners in capital cases — the meaning is evidently prisoners before conviction; for after conviction there is no such thing as proof and presumption," etc. That decision was made in a case of felony less than capital, and the exception having reference to the proof upon which a prisoner is bailable is al-

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cluded to as indicating the class of prisoners to which the whole clause is applicable, whether the prisoners be charged with capital or less felonies.

Our Bill of Rights refers to another matter that must be understood to be before conviction, by explaining that this clause was not intended to prohibit bail after indictment found. That authoritative explanation was first placed in the constitution of 1845, and was superinduced by the difference of opinion previously entertained as to the right of bail in a capital case even after indictment found, which had been settled by a then late decision of the Supreme Court of the Republic of Texas. 2 Hawk. L. and E. R. 447 ; *Yarbrough v. The State*, 2 Texas, 523.

In the State of Louisiana, where there is a similar provision in their Bill of Rights, and a statute the same as ours requiring the imprisonment of the person convicted of a felony during the pendency of the appeal, the Supreme Court decided the law to be unconstitutional. See case of *Longworth*, 7 La. 24, in 1852. The court manifests great reluctance in doing so, after an elaborate discussion (one member of the court dissenting to it), and suggests the probability of an amendment of the constitution in that respect so as to take away the right of bail after imprisonment, which was shortly afterward done by inserting in said clause the exception, "unless after conviction for any offense or crime punishable with death or imprisonment at hard labor. See La. Con. of 1852, Amer. Const. 351.

Our Supreme Court has acted upon cases involving the enforcement of this law, but not, that we are aware of, wherein the question was presented and argued as to its constitutionality, and therefore such cases would only be authority to the extent of acquiescence.

Another consideration favorable to the construction that the class of prisoners before conviction is secured the right of bail by this clause in the Bill of Rights is deducible from its origin and history. It was inserted in the constitution of the Republic of Texas of 1836. Oldham & White's Digest, 42. The principle asserted by it, as well as many others in the Bill of Rights then adopted, was not of Spanish or Mexican origin, but was imported into Texas with the Anglo-American population who had, in their first assumption of sovereign power in the provisional government of 1835, resorted to the "principles of the common law of England" for the protection of personal rights. Oldham & White's Digest, 19. The constitutions of a few of the States containing this clause qualify it by the expression "before conviction."

The constitutions of Arkansas, Missouri, Kentucky, Florida, Ohio, Tennessee, Pennsylvania (in 1838) and Rhode Island (1842) contain a similar clause, and from the exact similarity of the language used it may

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be presumed that they were copied from the constitution of North Carolina, adopted in 1776 (or other State constitutions of the same period), which is as follows: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great." American Constitutions, 242; Hurd on *Habeas Corpus*, 431-434.

In all the first constitutions of the several American States many provisions for the protection of personal rights and liberties were inserted, most of which related to freedom from illegal restraint and the insurance of a speedy and impartial trial for alleged offenses. They were for the most part extracted from the *Magna Charter*, Bill of Rights, and *habeas corpus* act of England, and extended to embrace still other principles which, though advocated by the friends of freedom, had not become a part of the British constitution.

If we look back through the long struggle against the tyranny and oppressions by which these great rights were secured, it will be found that the grievances complained of related to the treatment of prisoners before trial and conviction, and not after. Hurd on *Habeas Corpus*, 78, 90, 92; Hallam's Constitutional History, 140.

It is not believed that it was ever a matter of great complaint that the granting of a writ of error to revise a judgment of conviction was only by the consent of the king's counsel, and that during its pendency the defendant was never bailed in convictions of felony, except as matter of favor in such cases as the judges were satisfied should not be sustained or enforced on account of some defect in law or fact. Hurd on Corporations, 446, 430-31; Fisher's Digest Criminal Law, "Error and Appeal," 592. The Court of King's Bench had the right to bail after, as well as before, conviction. Concerning its exercise Hawkins uses the following strong language: "Bail is only proper where it stands indifferent whether the party be guilty or innocent of the accusation against him, as it often does before his trial; but where that indifference is removed, it would, generally speaking, be absurd to bail him." Hurd on *Habeas Corpus*, 430, 431.

Thus it would seem most likely that the prisoners to whom were intended to be secured the absolute right of bail were those charged with offenses before trial and conviction.

In this case the facts upon which the applicants rely for bail, under the writ of *habeas corpus* applied for to this court, fully appearing upon the written application, and the court not being satisfied that they are sufficient, the application is refused to be granted.

Application refused.

Lyles v. The State.

LYLES, appellant, v. THE STATE.

(41 Tex. 172.)

Jury must understand English.

Jurors who did not understand English were impaneled for the trial of a criminal case. Held error.

INDICTMENT for murder. Upon the trial nine of the jurors admitted to the panel against defendant's objection were unable to understand the English language. Defendant was convicted, and a motion for a new trial having been denied, appealed.

Coldwell & Zabriskie, for appellant.

George Clark, Attorney-General, for the State.

DEVINE, J. The appellant, George B. Lyles, was indicted, with four others, who were charged at the January term, 1874, in the District Court of El Paso county, as accessories with Lyles in the murder of José Maria Gamboa, on the 27th of October, 1872. The case being called for trial, one of the parties charged as an accessory was discharged, and the case dismissed as to him. On the close of the evidence, the court, on motion, directed the jury to render a verdict of not guilty as to another of the defendants, there being no evidence against him, which was immediately done, and the accused discharged from custody. The jury, after receiving the charge of the court, rendered a verdict of guilty of murder in the second degree against appellant Lyles, and a verdict of not guilty as to the other defendants, William Brown and Antonio Nieto. The court overruled defendant's motion for a new trial, and the cause is now presented for our revision on the grounds set forth in the motion for a new trial, and accompanying affidavits and the exceptions of defendant to the ruling of the court before and during the trial of the cause. So much of the bills of exceptions taken by defendant's counsel will be noticed as are deemed material to the decision of this case. The first bill of exceptions states, "while the jury was being impaneled to try said cause, the counsel for the defendant moved that no one be permitted to act as a juror who did not understand the English language, and the court overruled and refused said motion, and permitted nine jurors to sit

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upon said cause who did not speak nor understand the English language, to which ruling of the court defendant's counsel objected at the time," etc., etc.

The accused was entitled to a jury to pass upon his case who could understand the proceedings had during the trial. It is scarcely necessary to remark that the proceedings in the courts of Texas are in the English language. No other is allowed. There is no exception, save in the limited authority to use the Spanish language in judicial proceedings before justices of the peace in certain counties west of the Guadalupe river, "when neither the justice of the peace nor the parties are able to write or understand the English language." Pas. Dig., arts. 1223, 1224.

It would seem, therefore, a necessity that the jurors should have a reasonable knowledge of the language in which the proceedings are conducted, to enable them to perform their duties. This necessity becomes of the greatest importance in trials for capital felonies.

The constitution declares that "The right of trial by jury shall remain inviolate." It cannot be considered as remaining inviolate when the jurors can neither speak nor understand the language in which the proceedings are had. If the trial by jury is to remain a substantial fact and an important right, and is not to be substituted by a legal fiction bearing the name, but wanting in the most important qualifications of a jury, namely, the capacity to understand what the pleadings contain, what is said by the counsel in their addresses to the jury, and utterly unable to comprehend the charge of the court, then it is necessary that jurors unable to speak or understand the English language should be excluded from the panel. The Code does not, in express terms, make this one of the disabilities of a juror; and the reason would seem to be, that neither the framers of the Code nor the legislature which approved and adopted it supposed it possible that jurors would be forced on a party to try a cause when they could neither speak nor understand the language in which the trial was had — the only language recognized in this State as the language to be used in the district or other courts, save the exceptions cited in this opinion. A trial by such a jury as sat in this case was violative of section 16, article 1 of Bill of Rights of the constitution, which declares that "No citizen shall be deprived of life, liberty, property, or privileges, outlawed, or exiled, or in any manner disfranchised, except by due course of the law of the land."

In the case of *The State v. Marshall*, 8 Ala. 302, two persons were called as jurors who, on being questioned as to their qualifications, said, upon oath, they did not understand the English language sufficiently well

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to serve as jurors. The court set them aside. The defendant's counsel excepted to the action of the court, and, on appeal, it was held to have been no error on the part of the judge to direct the jurors "to stand aside," as it was evident they were not competent jurors — the inability of a juror to understand or speak the English language being, under the law of Alabama, as with us, no express ground of challenge. The court, in the opinion, declared that it was not the intention of the framers of the act that the enumerated causes of challenge should be exclusive of all others, and that it was evidently not the design of the legislature to impair the discretionary power of the court to set aside any one summoned as a juror who, from any cause, was unfit to serve as a juror. We believe a large discretionary power necessarily exists, and is properly vested in the presiding judge, respecting the admission or rejection of jurors, but we believe in this case the court erred in overruling defendant's exceptions to the nine jurors for the want of knowledge either to speak or understand the English language.

The other exceptions were unimportant.]

Judgment reversed.

 FLANAGAN, appellant, v. PEARSON.

(42 Tex. 1.)

Bankruptcy — fiduciary debts — claims against attorneys.

A claim against an attorney for the conversion of his client's money or property is a debt created while acting in a fiduciary character and is not, within the meaning of the bankrupt act, discharged by proceedings in bankruptcy.

ACTION by J. W. Flanagan to restrain the enforcement of a judgment rendered against him, May 7, 1867, on the ground that since the recovery of said judgment he has been duly discharged in bankruptcy. The necessary facts are stated in the opinion. Judgment was entered on a verdict for defendant, and plaintiff appealed.

M. W. Morris, for appellant.

Martin Casey, for appellee.

GOULD, J. The petition in the original suit alleged that, on the 8th of July, 1841, J. E. White conveyed to petitioner, Pearson, by title bond, 354 acres of his head-right certificate; that on March 28, 1850,

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petitioner agreed with defendant, Flanagan, and Nathan G. Bagley, being licensed attorneys at law practicing in partnership under the style of Flanagan & Bagley, to convey to them one-third of said 354 acres of land, if they, the said Flanagan & Bagley, would locate said land for petitioner, and obtain for him a good title to the same, or return to him said bond; that in pursuance of said contract, he delivered to them the title bond from White, and the said Flanagan & Bagley executed to him their written receipt, as follows:

"THE STATE OF TEXAS, }
 "County of Rusk. }

"Received of P. H. Pearson a bond from J. E. White to him for three hundred and fifty-four acres of land, which we agree and obligate to return to said Pearson, in case we fail to comply with a contract for locating and perfecting the title to the same. This 28th day of March, A. D. 1850.

"(Signed)

FLANAGAN & BAGLEY."

The petition further states that, on the 3d day of August, 1852, the said Flanagan, intending to cheat, swindle, and defraud petitioner out of his right to said land and land certificate, contracted to sell the entire J. E. White league certificate to one Ussery, and afterward made said Ussery a warranty deed to the entire certificate; that the entire certificate had been located and surveyed (making exhibit of various locations and field notes for Ussery) on land worth three dollars per acre; that said Flanagan by his said fraudulent acts disabled himself and the said Bagley from fulfilling their agreement, and that by said fraud he was damaged five thousand dollars; praying for vindictive damages, etc.

The bond of White to Pearson, made an exhibit to this petition, bound him in the sum of two thousand dollars to make to Pearson a good and sufficient title to 354 acres of land out of his certificate, so soon as he obtained a patent from the government of Texas, reciting as follows: "Said White having sold to Alex. Jourdan one-third of a league of his head-right, and twelve hundred and ninety-nine acres to Dimes Reeves, which is to be located by said Reeves, and surveyed in one solid tract, together with the three hundred and fifty-four acres above mentioned, forming a tract of 3,129 acres, the third of league sold to Jourdan is to be selected first from off one side or end of said tract, and then said Pearson is and shall have the first choice to select his 354 acres from either corner of the remaining tract of 1,658 acres in a square or oblong form." The consideration was stated to be one hundred and fifty dollars.

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The answer of Flanagan to this original petition consisted of exceptions, a general denial, and pleas of limitation and prescription.

The charge of the court was to the effect that if Flanagan "had violated his duties or obligations to his principal by positive misconduct, by selling and converting to his own use, and as his own property, the portion of said certificate which the said title bond was intended to secure to plaintiff, you will find a verdict in favor of the plaintiff for the damages sustained by him for such misconduct or neglect of duty as such attorney and agent of plaintiff."

The jury brought in a verdict for plaintiff of \$2,250. On a motion for a new trial being made, Pearson was required by the court to remit, and did remit, all except \$1,000, for which amount judgment was rendered, and that judgment was, on appeal to this court, affirmed.

This statement of the pleadings and record shows that the course of action set up in the petition in that case was an alleged fraudulent breach of duty by Flanagan, as the employed attorney of Pearson, in converting to his own use the bond intrusted to him as such attorney. The judgment is a debt founded on this breach of duty in his fiduciary capacity as an attorney. For the purposes of this case the record is conclusive evidence that the debt evidenced by said judgment was created whilst Flanagan was acting in the character of an attorney by his misconduct as such. In the view which we take of it, it is not material to determine whether the record establishes a debt created by fraud or embezzlement within the meaning of the bankrupt act; for whether the breach of duty amounted to such fraud or embezzlement or not, we think that a debt growing out of the conversion by an attorney of his client's money or property, in his hands as such, both on principle and authority, is a debt created whilst acting in a fiduciary character. The case of *Heffran v. Joyne*, 39 Ind. 464, is in point, as to money collected by an attorney. The court decides that a discharge in bankruptcy is no bar to the collection of such a debt, and places it on the ground that an attorney acts in a fiduciary capacity. In *White v. Plott*, 5 Denio, 274, the same proposition is laid down as conceded. The relation of attorney and client is one of trust and confidence; and breaches of duty, such as the appropriation of money collected, or of papers intrusted to the attorney in the way of business, have always been punishable by the courts. (Bac. Abr., title, Attorney.) Such embezzlement by an attorney was excepted out of the English insolvent laws. (Id.)

Courts have differed as to whether the construction given to the words "fiduciary character," under the bankrupt law of 1841, is to be regarded as intended to be adopted by the use of the same words in the present

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law, as ably argued in *Cronan v. Cotting*, 104 Mass. 245 ; S. C., 6 Am. R. 232, or, on the other hand, whether a change of meaning is not fairly inferable from the omission to specify "as executor, administrator, guardian or trustee," as was done in the former law. See *Lemcke v. Booth*," 4 Am. R. 326 ; 47 Mo., 385 ; *In re Seymour*, 6 Int. Rev. Rec. ; *Treadwell v. Holloway*, 46 Cal. 547. As held in *Chapman v. Forsyth*, 2 How. 208, the words, "of a fiduciary capacity," mean the same class of trusts as executors, administrators, guardians, and trustees, and we think the relation of attorney and client is nearly enough of that class to be within the spirit of that decision. For some purposes the relation of attorney and client is classed by courts of equity with those of trustee and *cestui que trust*, and guardian and ward. Ad. Eq. 184.

If it were not conclusively settled, so far as this case is concerned, that the judgment in the original suit, it might well be questioned whether the location of a land certificate is properly within the scope of an attorney's duties, even when undertaken as an attorney. It can hardly be doubted, however, that the undertaking to perfect the title to land is a legitimate professional contract. Especially was this so in this case, because of the complicated nature of Pearson's claim. He held only an obligation for title to be made when a much larger part of the certificate was located by Reeves. The perfection of his title was, under the circumstances, a proper subject of professional employment. But the plaintiff cannot reopen this question ; nor the question whether Pearson was, in fact, misled by the conduct of plaintiff, left without remedy for the recovery of the land on which the certificate was located, nor yet the question whether the amount of the original judgment was not excessive, notwithstanding the *remittitur*. These questions do not enter into the case as presented to us.

But it seems to be contended that the affirmance of the judgment by this court, pending the proceedings in bankruptcy, and in the absence of any suggestion by defendant of his bankruptcy, was a nullity. We have not been referred to any decision going to that extent. The cases *Taylor v. Bonnett*, 38 Tex. 522, and *Johnson v. Poage*, decided by our predecessors, not yet reported, refer to the enforcement of liens in the courts of the State after bankruptcy, and hold that in such cases the State courts have no longer jurisdiction. They do not refer to cases excepted from the operation of a discharge, nor do they refer to cases pending in the appellate court. They were cases heard on appeal, and not cases attacked collaterally, and it is not clear that the court mean to hold more than that it is error to proceed in such cases after the institution of proceedings in bankruptcy. The State courts have often held, in regard

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ordinary causes pending against the bankrupt, it is not even error to proceed to final judgment, where no application for stay of proceedings is made by the bankrupt. *Stone v. Brookville National Bank*, 39 Ind. 287; *Bradford v. Rice*, 102 Mass. 472; S. C., 3 Am. Rep. 483.

In *Merritt v. Glidden*, 39 Cal. 564, the court held the judgment appealed from to be a final judgment within the meaning of the bankrupt act. See also *O'Neil v. Dougherty*, 46 Cal. 575. The proceedings in the Supreme Court may be regarded as in the nature of a suit to test the correctness and validity of that judgment. *Id.*, and *Gibbs v. Belcher*, 30 Tex. 80. But see, *contra*, *In re Metcalf*, Bank. Reg. Supp. 48. No method has been suggested by which a discharge in bankruptcy could be plead or contested in this court, and it would be useless even to stay the proceedings, as in the lower court, for the purpose of allowing it to be obtained and plead.

We hold that the affirmance of the judgment against Flanagan in this court was valid, and that the judgment is a debt created whilst acting in a fiduciary character, and is not within the operation of his discharge in bankruptcy.

The judgment is affirmed.

Affirmed.

YARBOROUGH, appellant, v. WOOD.

(42 Tex. 91.)

Vendor's lien — sale of land on execution — lien for excess of purchase-money.

Plaintiff's land was sold by the sheriff at auction under an execution and bought by defendant who bid more than enough to satisfy the execution. *Held*, that plaintiff had a lien on the land for the excess of the purchase-money.

ACTION by appellant, Hugh Yarborough, on the following instrument executed by appellee, Matthew Wood.

“Agreement between Matthew Wood and George Yarborough :

“That said Matthew Wood agrees to pay to the order of George Yarborough the balance of nineteen hundred and sixty-three dollars, with ten per cent. interest on said balance from date, after paying all legal debts or judgments against Hugh Yarborough, for which the land was sold. Tyler, December 4, 1861.

(Signed)

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Appellant claimed that this instrument was executed to George Yarborough as his agent, and in payment for his land; that the debt was due to him, and asked for the enforcement of a vendor's lien claimed to exist in his favor. It appeared from the pleadings and evidence that a tract of 320 acres of land was levied on by virtue of two executions against Hugh Yarborough, amounting together to the sum of \$109, and on the day of December, 1861, was sold by virtue of said executions, and bid off by George Yarborough, for the sum of \$1,963.50. George Yarborough arranged with appellee, Wood, to take the land at his bid, and pay to the sheriff the amount of the executions under which the land was sold. It seems that George Yarborough, as agent for his brother Hugh, had also arranged with the sheriff that the payment of the excess of his bid over the amount of the executions should not be required in cash, and this privilege be extended to Wood. Wood accordingly executed the instrument sued on, paid the executions, and received the sheriff's deed directly to himself. He subsequently paid off two other judgments against Hugh Yarborough, at the request of George, amounting to \$152.50. Defendant, Wood, claimed also to have dealt with George Yarborough as the owner of his obligation, and claimed credit for various claims against him. The verdict was as follows:

"We, the jury, find for the plaintiff \$1,697.75; and we further find that the land described in the plaintiff's petition was sold by the sheriff of Smith county, as sheriff, by virtue of two executions, and it was sold at public auction; and that the instrument sued on in this case was given for the money bid at the said sale."

The court refused to give any instructions recognizing that the plaintiff was or might be entitled to the vendor's lien, and the judgment rendered is simply for the recovery of the amount found.

John L. Henry and Stephen Reaves, for appellant.

Herndon & Robinson, for appellee.

GOULD, J. It is not proposed to notice all of the errors assigned.

It is evident that the verdict of the jury is for a less amount than plaintiff was entitled to, allowing defendant every credit or offset claimed in his pleadings, and even giving him the benefit of credits not set up in his answer, and which he was erroneously permitted to prove over the objection of plaintiff. These errors are each pointed out in the assignment, and are sufficient to entitle plaintiff to the new trial which was asked and refused.

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We are also of the opinion that, if the instrument sued on was given in payment for the excess of the purchase-money bid for the land over the amount of cost required by the sheriff to satisfy the executions under which it was sold, the fact that the transaction was consummated through the powers of a sheriff's deed is not inconsistent with the existence of the vendor's lien. Counsel for neither party have cited us to any case in point, nor have we found any, and in the absence of authority we are left to apply the principles which we think control the question. The excess of the amount realized at an execution sale over what is required to satisfy the executions is the property of defendant in execution, and, of course, subject to his control. It is, we think, correctly argued by appellant that the sheriff, in making the sale, may be regarded as the agent of the execution creditors to the extent of their claim, and of the defendant in execution as regards any surplus. Crocker on Sheriffs, §§ 407, 471; Rorer on Judicial Sales, §§ 54-56; *Cooper's Lessee v. Galbraith*, 3 Wash. C. C. 546.

This principle has been applied so as to recognize that, by consent of all the parties, a sheriff's sale may be made on a credit. *Kilgore v. Peden*, 1 Strobb. 18; 6 Cowen, 467; 3 Seld. 453. If, then, in this case the plaintiff and sheriff, at his request, made through his agent, extended time to defendant for so much of his bid as plaintiff rightfully controlled, it is not perceived that the transaction is not in substance *pro tanto* a sale of the land consummated through the powers of a sheriff's deed. The substantial principle upon which the vendor's lien is said to rest, "that a person who has gotten the estate of another ought not in conscience, as between them, to be allowed to keep it, and not to pay the full consideration money," seems applicable to the case. Story's Eq., § 1219. The facts of the case seem to us to be such as entitled the plaintiff in equity to the lien. *Wynn v. Flannegan*, 25 Tex. 778. By his consent only was it that defendant was enabled to receive a deed without paying in full in cash. The deed to that extent may be regarded as the act of plaintiff. So regarding it, the law would uphold the lien, unless it is waived either expressly or by acts showing such intention, *Briscoe v. Bronaugh*, 1 Tex. 326.

It is not perceived that the bankruptcy of George Yarborough affected the right of Wood to such offsets as he acquired under the honest belief that George Yarborough was the party with whom he had dealt and to whom he was indebted.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Turner v. Miller.

TURNER v. MILLER.

(42 Tex. 418.)

Damages — in action on covenant of warranty — attorney's fees.

In an action by a purchaser of land on the vendor's covenant of warranty, the attorney's fees paid by the purchaser in defending the title cannot be allowed as damages. (See note p. 49.)

ACTION by Miller against the heirs of Turner for breach of a covenant of warranty. The opinion states the case.

(No briefs for plaintiffs in error.)

Fnord, Thompson & McCormick, for defendant in error.

ROBERTS, C. J. This case is brought up as an "agreed case" under the statute, presenting one question, which is, what is the measure of damages in a suit upon a general warranty of title to land, after an eviction of the vendee, by superior title, maintained in a suit against the vendee. Paschal's Digest, art. 1516.

The judgment was rendered upon, and in accordance with the following verdict: "We, the jury, find for the plaintiff "the sum of five hundred and fifty-four dollars and twenty-four cents in gold, amount of purchase-money and cost due, and the further sum of one hundred and six dollars, gold, attorney's fees paid by him."

In the agreement it is stated that "the precise point now presented to the Hon. Supreme Court is as to the liability of defendants in this action for attorney's fees expended by plaintiff, in the said suit of Key and wife above-named;" it being the suit in which the plaintiff, as vendee, was evicted. The vendee upon being sued in the last-mentioned suit did not give notice of it to his vendor. This, however, has not been held to make any difference as to the measure of damages, but only as to the conclusive effect of the judgment of eviction, as matter of evidence. Rawle on Cov. for Title (4 ch. ed.), 309.

From the authority cited it would appear that attorney's fees taxed as costs of the suit are allowed in England, and also in America in those States generally where attorney's fees are taxed as costs.

As to the allowance of counsel's fees, not taxed, there is a difference of decision in different States. In New York, and other States following its precedents, they are allowed as damages. In Massachusetts, and other States following its precedents, they are not allowed. *Rickert v.*

Snyder, 9 Wend. 422. *Contra*, *Leffingwell v. Elliott*, 10 Pick. 204; Sedg. on Dam., marg. p. 174; Rawle on Cov. of Title, 121-125.

The rule has been laid down in covenants for title in this State, that upon failure of title the measure of damages is the purchase-money, with interest. *Garrett v. Gaines*, 6 Tex. 443; *Hall v. York*, 22 Id. 643.

In a case decided by this court, where there was a general warranty, and an eviction by suit, the vendee claimed and recovered counsel fees upon a special promise that the vendor would bear the expense of litigation, if the vendee would defend the suit, which he did, and failed by reason of a superior title. *Rowe v. Heath*, 23 Tex. 620.

In sustaining that case, Justice WHEELER in delivering the opinion incidentally remarked: "And it seems from the authorities that he was so entitled (to recover the attorney's fees) without proving any contract or express promise to that effect, the more especially as he made defense at the instance of the grantor. Rawle on Covenants, 121-125. The case, however, was not decided on that intimation, but expressly upon the special contract to pay counsel fees.

We have been referred to no case in our reports, wherein counsel fees have been allowed as damages in a suit upon a general warranty alone, and have found none such.

Chancellor KENT, in his Commentaries, states the rule of damages to be the purchase-money and interest thereon. He arrives at it by reference to the rule on the ancient warranty at common law, which was to restore to the party evicted other land of equal value, estimating it at the time the warranty was made. Hence he says in reference to the personal covenants of warranty now in use: "The buyer on the covenant of seizure recovers back the consideration money and interest, and no more." 4 Kent's Com. 475.

The same view is presented by him in his opinion in an early case decided in the State of New York. In the same case Justice LIVINGSTON delivered an opinion in which the view was advanced, that counsel fees were allowable, though from the facts of the case as reported, it does not appear whether counsel fees were embraced in the recovery or not. *Staats v. Executors of Ten Eyck*, 3 Caines, 115-117.

By the Supreme Court of Louisiana it was said: "We have had occasion repeatedly to state, that the law does not ordinarily allow fees of counsel who are employed to vindicate the rights of parties. *Hale v. The City of New Orleans*, 13 La. Ann. 502.

We are of opinion that the correct rule is, and should be, not to allow counsel fees in a suit on a general warranty, as in this case, when there is no question of fraud, imposition, or malicious conduct involved. A

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tract of land or a lot may be sold for a few hundred dollars, both parties believing the title to be good. Its value may be enhanced fifty-fold by improvements, and by the rise of property. The defense of the title may require the expenditure in counsel fees of an amount many times greater than that of the purchase-money of the land or lot and the interest thereon. The value of the improvements, far more than of the land, would furnish the estimate of the counsel fees in defending the title. If these counsel fees were allowed, as against the warrantor, it would often be hazardous in the extreme to sell lands or lots at any price that purchasers could afford to give for land upon which to make valuable improvements.

Whether it be considered in reference to principle, precedent, or practical operation, the rule as to the measure of damages in such a case as this should exclude the counsel fees expended in defending the suit of eviction by the vendee, when he sues the vendor upon his general warranty of title.

This being an agreed case, and the counsel fees that were allowed having been designated separately in the verdict and judgment, being the sum of one hundred and six dollars, gold, it is ordered and adjudged that the judgment be reversed and reformed, omitting therefrom the said amount of counsel fees.

MOORE, J., did not sit in this case.

Reversed and reformed.

NOTE.—In several of the States it has been recently held that the measure of damage on the breach of warranty in a deed, is the value of the property at the time of the conveyance and interest thereon, together with the necessary costs and expenses incurred in defending the title and that such costs and expenses include a reasonable counsel-fee. *Robertson v. Lemon*, 2 Bush, 301; *Dalton v. Bowker*, 8 Nev. 190; *Keeler v. Wood*, 30 Vt. 242; *Smith v. Sprague*, 40 id. 43. See also, *McGary v. Hastings*, 39 Cal. 360; S. C., 2 Am. Rep. 456; *Levitzky v. Canning*, 33 Cal. 299; *Harding v. Larkin*, 41 Ill. 413; *Major v. Dunnivant*, 25 Ill. 262; *Hoot v. Spade*, 20 Ind. 326; *McAlpine v. Woodruff*, 11 Ohio St. 120.—REP.

But in *Yokum v. Thomas*, 15 Iowa, 67, it was held that a grantee, to entitle him to recover sums expended in proceedings to quiet title, must have first demanded proceedings by his grantor for that purpose. See also, *Jetter v. Glenn*, 9 Rich. S. C. 374. In Louisiana the warrantor is held not to be liable for the fees of counsel employed by the party evicted. *Sarpy v. New Orleans*, 14 La Ann. 311; *Williams v. Le Blanc*, id. 757.

In New Hampshire it is held that in an action on a covenant of seizin and against incumbrances the plaintiff cannot recover counsel-fees for defending the action by which he was evicted, accruing after the covenantor on notice assumed the defense. *Kennison v. Taylor*, 18 N. H. 220.—REP.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

GRAVES, appellant, v. THE LEBANON NATIONAL BANK.

(10 Bush. 23.)

Bank — sureties on official bond of cashier released by negligence of directors. Presumption as to date of instrument. Acceptance of bond.

Defendants became sureties on the official bond of a bank cashier, being induced so to do by a statement published by the directors, according to law, whereby the affairs of the bank appeared to be well managed. The cashier of the bank was a defaulter when the statement was published, of which fact the directors, by the use of slight care, might have learned. In an action on the bond for subsequent embezzlements, *held*, that the sureties were not liable; they had a right to believe that, before publishing the statement, the directors had used reasonable diligence in ascertaining the condition of the bank, and, being misled by the statement, were not bound.

A bond was dated the — day of — 1869. *Held*, that the legal presumption was that it did not become binding on the obligors until the last day of that year.

It is not essential that national banks shall signify their acceptance of the official bonds of their officers in writing.

ACTION against the sureties on an official bond. The opinion states the case.

Roundtree & Rodman, for appellants.

W. J. Lisle and W. B. Harrison, for appellees.

LINDSAY, J. The judgment now before this court for revision is that rendered in the cross-action of the *National Bank of Lebanon v. E. A.*

Graves v. The Lebanon National Bank.

Graves, D. L. Graves, and R. C. Harris, sureties for Mitchell, the defaulting cashier.

Although the bond sued on was executed to the president and directors of the bank, it is evident that it was for the protection of the association, and no sufficient reason is perceived why it may not maintain the action.

The right to take advantage of a supposed defect of parties appearing on the face of the cross-petition has been waived. Appellants did not make this defect a ground of demurrer, nor was it taken advantage of by plea. The answer goes to the merits of the controversy, and upon the issues raised the cause was prepared and submitted for judgment. The fact that there is a defect of parties plaintiff cannot be made a question for the first time in this court.

The National Bank of Lebanon organized under the provisions of the national currency act of June 3, 1864. It commenced business on or about the 3d of August, 1869, at which time Mitchell was selected as cashier, and was at once inducted into office. Although required to execute bond immediately, for reasons not satisfactorily explained by the record, the bond was not delivered until about the 1st of November following. In June, 1870, Mitchell was discovered to be a defaulter to a large amount. He failed to make good the losses occasioned by his breach of duty, or to sufficiently indemnify the bank, and this action was instituted to recover from his bondsmen the amount of these losses.

From what has already been said it is not necessary to notice further the technical defenses relied on by appellants, except to state that we do not regard it as essential that banking institutions doing business under the national currency act shall signify their acceptance of the official bonds of their cashiers by a written memorandum to that effect entered upon the journals or minute-books kept by their directory.

The acceptance of the bond may be presumed from the fact that after it has been submitted to the directory for approval it is retained by the bank, and the cashier permitted to enter upon or continue in the discharge of his duties; and that it was presented to and approved by the directory may be established by oral testimony. *Bank of United States v. Dandridge*, 12 Wheat. 64; *Dedham Bank v. Chickering*, 3 Pick 335; *Amherst Bank v. Root*, 2 Metc. (Mass.) 522; *Union Bank v. Ridgely*, 1 Har. & G. 324; 1 Morse on Banking, 223.

The defalcations for which appellants are sought to be held liable are alleged to have occurred between the 14th of September, 1869, and the 3d of June, 1870. The court below adjudged that the sureties in the bond should account for such as occurred after its acceptance, and rendered judgment against them for \$8,089.23.

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The first business transacted by the bank after its organization was the purchase of the assets of the banking firm of Burton, Mitchell & Co.

Mitchell, the defaulting cashier, was a member of that firm, and had been acting as its cashier. The National Bank accepted from Burton, Mitchell & Co. bills and notes represented to amount to about fifty-one thousand dollars, but which in point of fact amounted to only about thirty-nine thousand dollars. This discrepancy was the result of embezzlements upon the part of Mitchell while acting as cashier for said firm. It may be presumed that Burton, the senior member of the firm, who became one of the directors of the National Bank, was ignorant of these embezzlements. The directory seem to have relied implicitly upon the integrity of Mitchell, and hence he was enabled not only to conceal the frauds practiced on Burton, Mitchell & Co., but by such concealment to commence the discharge of his duties as cashier of the National Bank by a fraud upon it.

In October, 1869, the banking association, pursuant to the provisions of section 34 of the national currency act, and the amendment thereto of March 3, 1869, made a report to the comptroller of the currency, and on the 23d day of that month caused it to be published in the Lebanon Clarion, showing in detail and under appropriate heads its resources and liabilities at the close of business October 9, 1869. This report was sworn to by Mitchell, and certified to be correct by three members of the directory.

Similar reports were made and published in the same newspaper touching the condition of the association on the 22d of January, the 24th of May, and the 9th of June, 1870. None of these reports showed embezzlements upon the part of the cashier or any officer connected with the bank. They were not only not calculated to excite suspicion as to the manner in which the affairs of the association were managed, but tended to inspire the public with confidence in its prosperity and in the integrity of those to whom its business affairs were committed.

Appellants plead and rely upon the statements thus officially promulgated by the officers of the bank as constituting an estoppel upon it to assert against them claims that cannot be established without showing that these official reports, made and published in obedience to law, were not true. We are not inclined to the opinion that they can claim immunity upon account of any report made after they became the sureties of Mitchell. The reports are sworn to by him, and it may be assumed that upon his representations, and upon what appeared from the books of the association as kept by him, the directors were induced to certify to their accuracy.

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The directors may have been negligent in the discharge of their duties, and this negligence may have enabled Mitchell for the time to misappropriate the funds of the bank, and to conceal its true condition by the false reports made to the comptroller of the currency and by false entries upon the books of the association. But this negligence cannot avail the sureties who covenanted that their principal should "well and truly perform the duties" of his position, and should "well and truly account for all moneys and other valuables that 'might' pass through his hands." Their covenant is unconditional, and no failure of duty upon the part of the directors of the association, short of actual fraud or bad faith, can be deemed sufficient to exonerate them from its performance. The exaction of the bond implies that the association was not willing to rely alone upon the watchfulness and care of the directory. It required in addition to that safeguard that the honesty and fidelity of its cashier should be guaranteed by sureties who were able to make good any losses it might sustain by reason of his negligence or dishonesty.

There is a question, however, arising upon the facts stated in the pleading and fully sustained by the proof, the decision of which, it seems to this court, must be in favor of the sureties; and this question being decided in their favor, their exoneration from liability on account of Mitchell's misconduct while acting as appellee's cashier, and after the bond was delivered and accepted, follows as a necessary sequence.

There is no principle of law better settled than that persons proposing to become sureties to a corporation for the good conduct and fidelity of an officer to whose custody its moneys, notes, bills, and other valuables are intrusted have the right to be treated with perfect good faith. If the directors are aware of secret facts materially affecting and increasing the obligation of the sureties, the latter are entitled to have these facts disclosed to them, a proper opportunity being presented. *Morse on Banking*, 226.

White and Tudor, in their note to the case of *Rees v. Berrington*, 2 *Leading Cases in Equity*, page 707, state the rule as follows: "Wherever, therefore, there is any misrepresentation, or even concealment from the surety, of any material fact which had he been aware of he might not have entered into the contract of suretyship, it will thereby be rendered invalid, and the surety will be discharged from his liabilities."

The cases cited by the commentators fully sustain the principles as stated

Mr. Justice STORY takes even broader ground: "Thus, if a party taking a guaranty from a surety conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions

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as to the real state of facts, such concealment will amount to a fraud, because the party is bound to make the disclosure, and the omission to make it under such circumstances is equivalent to an affirmation that the facts do not exist." 1 Story's Eq. Jur. § 215.

The learned judge cites in this connection from *Maltby's case*, 1 Dow, Parliament Cases, the instance of a party who, knowing himself to have been cheated by his clerk, concealed the fact, applied for security in such a manner and under such circumstances as held out the clerk as one whom he considered as a trustworthy person, and thereby induced another to become his surety. The contract of suretyship thus obtained was held to be void, and silence under such circumstances being treated as expressive of a trust and confidence held out to the public equivalent to an affirmation.

It may not be true that the directors of the Lebanon bank had actual knowledge of the frauds committed by Mitchell while cashier of Burton, Mitchell & Co., nor of the false entries made by him on the books of the institution under their control in order to conceal those frauds, but it is true that either with or without examination they published reports of the affairs of the banking institution, the natural if not the necessary effect of which was to mislead the public. That these reports reached the eyes of appellants we cannot doubt.

They each resided in or near the town of Lebanon, and were subscribers to and readers of the local paper in which the publications were made; and as they were each largely interested as stockholders in the banking institution, it may be assumed that they read and examined at all events the first official statement made by the officers to whom they had intrusted the management of that portion of their estate invested in the stock of the banking association. If it could be shown that the directors were cognizant of the fraud of Mitchell, committed on the first day of his connection with the bank and in the performance of his first duty as cashier, and that they concealed this fact from these appellants, and permitted the false statement of October 9, 1869, to be forwarded to the comptroller of the currency and published to the world, there could be no shadow of doubt that the concealment and publication would amount to a fraud upon the sureties.

It is proper, however, to consider the legal effect of two circumstances connected with the failure of the directory of the bank, to apprise the sureties of the fraud of Mitchell, and of the publication of October 23 in the Lebanon newspaper. The first is, that the directors, or at least so many of them as were sworn as witnesses, state that they were not apprised of the perpetration of the fraud. The second is, that the

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report of October 9, 1869, published on the 23d of that month, was but a statement of the condition of the affairs of the association as shown by its books.

Upon the first question it is to be observed that several of the directors, and among them Burton, of the firm of Burton, Mitchell & Co., upon whose indorsement its assets were received by the Lebanon Bank, were not sworn at all; and further, that it appears upon the journal kept by the directory, as of date August 3, 1869, that "the bills of exchange and accounts of the firm of Burton, Mitchell & Co., bankers, having been submitted for examination and examined, it was resolved by the board of directors to receive the same, with the indorsement of Messrs. Burton, Mitchell & Co., and the cashier was directed to transfer the same to the books of the National Bank." Whether this written memorandum, kept by the directory as evidence of its official action, is or not conclusive as to the examination of the bills of exchange and accounts of the firm of Burton, Mitchell & Co., need not here be decided. The fact of the examination is not directly contradicted by any evidence in the case, and for the purposes of this litigation the presumption should be indulged that it was actually made.

From the depositions of the president of the bank, of Wilson, a director and of Wilkins, who was first the clerk and is now the cashier of the institution, it is manifest that the most cursory examination of the bills, notes, and accounts turned over to the bank by Burton, Mitchell & Co., would have disclosed a deficit of more than twelve thousand dollars.

We cannot, without disregarding the proof before us, fail to conclude that the directory either was advised of this discrepancy in Mitchell's accounts, or that it relied on his representations and the indorsement of Burton, Mitchell & Co., and made no examination, notwithstanding the bills, notes, and accounts purchased amounted in the aggregate to more than half as much as the capital of the institution for which they were acting.

The directors may not have been bound to notify the sureties of the manner in which this transaction was conducted; but most assuredly these parties had the right, under the circumstances, to presume that in the first business transaction of the bank, involving as it did so considerable an amount, the directory exercised at least slight diligence, and this presumption was greatly strengthened by the published report appearing on the 23d of the following October. A fraud may be perpetrated as well by the assertion of facts that do not exist, ignorantly made by one whom the person acting upon the assertion has the right to suppose has used reasonable diligence to inform himself, as by concealing facts

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known to exist which in equity and good conscience ought to be made known.

The publication as to the resources and liabilities of the association on the 9th of October, 1869, does not purport to have been made from its books. It was styled "Report of the Condition of the National Bank of Lebanon at the close of business October 9, 1869." The resources and liabilities are stated under appropriate heads. The report is sworn to by the cashier, and its accuracy attested by three members of the board of directors.

There is nothing in the publication to indicate that it was founded upon the books of the association. The clear import of the language used is that it exhibits the actual condition of the affairs of the bank.

It is in proof that the forms furnished by the comptroller of the currency authorized the reports to be made out from the books; but it is not shown that the sureties knew any thing about these forms; and looking to the law defining the duties as well of the comptroller as of the officers of the bank, they would acquire no such information.

The 34th section of the currency act requires every association organized under its provisions at stated times to make reports to the comptroller, which "shall exhibit in detail and under appropriate heads the resources and liabilities of the association before the commencement of business on the morning of the first Monday of the months of January, April, July, and October of each year." The amendment of March 3, 1869, requires five of these reports each year, to be verified by the oath or affirmation of the president or cashier and attested by the signature of at least three of the directors, each of which is to be published in a newspaper published in the place where the association does business, if there be one, and if not, then in a newspaper published in the county nearest thereto. This amendment provides, as did the original act, that the resources and liabilities of the association shall be reported; and as conclusive evidence that the actual and not the apparent resources and liabilities are to be reported, the comptroller is empowered by the amendatory act to call for special reports from any particular association whenever in his judgment it shall be necessary, "*in order to a full and complete knowledge of its condition.*"

It seems therefore that before the delivery and acceptance of the cashier's bond, and before appellants had become guarantors for his diligence, honesty, and fidelity, the banking association, pursuant to the provisions of the law to which it owed its existence, published to them and to the world a statement of its condition, from which it appeared that its affairs were being prudently and honestly administered, and from

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which they and the public had the right to believe that the cashier, to whom had been intrusted the moneys, notes, and valuables of the bank, had up to that time acted as a trustworthy person.

If the sureties acted upon the impression thus created by the affirmative act of the party now claiming to enforce the stipulations of their bond, it is plain that they should be discharged from liability.

For reasons satisfactory to our minds we have already decided that it should be presumed that the sureties did read and examine the report published in the *Clarion* of the 23d of October, 1869. It yet remains to be determined whether the bond was accepted before or after that time. It bears no date except "the day , 1869." The legal presumption therefore is that it did not become binding on the bondsmen until the last day of that year.

The bank fails to show the exact date of its delivery. One of the directors gives it as his recollection that it was about the 1st of October, 1869. The president and one other director fix the time of delivery at about the 1st of November, 1869, and the president states as a circumstance conducing to sustain his recollection that he was in that year a member of the State legislature, and that the bond was handed to him a month or more before he left for Frankfort, which was early in December. The directory itself was not willing to fix the date of the acceptance of the bond, and in an order entered upon its minute-book, purporting to record the action of the board at the time of its approval neither the month nor the day is given.

Considering the presumption arising from the want of a specific date to the bond and the preponderance of the testimony offered by the bank itself, we conclude that it was not accepted earlier than the 1st of November, 1869, about one week subsequent to the publication of the report of October 9th of that year.

We have, therefore, a case in which the directory of the bank held out to others as a trustworthy officer a man who had been guilty of repeated embezzlements and frauds, all of which might have been discovered by the exercise of slight diligence. However innocently the publication tending to show that Mitchell was an honest and faithful officer may have been made, the fact remains that the public had the right to act upon the presumption that the three directors attesting the accuracy of the statements contained in the publication had made some investigation at least to inform themselves as to the matters to which it related.

The effect of the published report was to inspire the public with confidence in the officers of the bank, to disarm suspicion, and to prevent inquiry.

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The losses occasioned by the fraudulent appropriations by Mitchell of the bank's money after the acceptance of his bond must fall upon either the association or upon his sureties. The latter are free from blame. They acted in the matter with reasonable prudence and discretion. They relied upon the truth of representations made by those having the right to speak for the bank. These representations have turned out to be untrue. Had the sureties suspected that they were untrue, it cannot be supposed they would have entered into the contract of suretyship. Such being the case, the contract must be adjudged invalid.

The judgment against the sureties is reversed, and the cause remanded with instructions to dismiss appellee's cross-petition. .

HOKE, appellant, v. FIELD.

10 Bush, 144.)

Office — appointment to — when may be oral.

A statute authorized "the county judge of the Jefferson County Court" to appoint a collector of taxes. *Held*, that the appointment might be by parol and need not be evidenced by any record or other writing.

ACTION by Hoke against Field to prevent the latter from exercising the duties of collector of back taxes of Jefferson county. No facts are stated in the original report further than those contained in the opinion. From that it appears that Field claimed to have been appointed to said office by the county judge of the Jefferson County Court, pursuant to the statute cited in the opinion, on the 3d day of March, 1873, and that he duly qualified. On the 29th of April following the County Court made an *ex parte* order attempting to revoke his appointment, and on the 13th of May Hoke was appointed by the county judge and took the oath and executed the bond.

The plaintiff's petition was dismissed below and he appealed to this court.

Mundy & Parsons, for appellant.

Russell & Helm, and *Muir, Bijur & Davie*, for appellee.

LINDSAY, J. The first and second sections of an act of the General Assembly, approved February 26, 1873, entitled "An act to authorize

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the judge of the Jefferson County Court to appoint a collector of back taxes for the county of Jefferson," provide as follows :

" 1. That the county judge of the Jefferson County Court be and he is hereby authorized to appoint a collector of back taxes for the county of Jefferson, who shall hold his office for the term of four years.

" 2. That the collector of back taxes so appointed shall be required to execute a covenant to and with the Commonwealth of Kentucky, with sureties to be approved by the judge of the Jefferson County Court, in manner and form as now required of sheriffs for the collection of the revenue, and subject to like restrictions and penalties, and renew the same at the February or March term of the Jefferson County Court annually."

The power to appoint the collector of back taxes is vested in the judge of the County Court. He is to exercise it in his character as judge, and whether the appointment be made in or out of court it is the act of the judge, and not of the court. In order, therefore, to make a valid appointment it is not necessary that any memorandum thereof shall be entered upon the order-book of the court.

The right of the appointee to be inducted into office depends upon the fact of the appointment, and not upon his ability to establish that fact by the production of an order of court.

The act under consideration does not prescribe the manner in which the judge shall make the appointment, nor does it direct that any written evidence of his action shall be furnished to the person appointed. In such a state of case it is only necessary that the person claiming the office shall show that the officer having the power to appoint has exercised that power, and decided in his favor. This decision must be evidenced by some "open, unequivocal act." *Marbury v. Madison*, 1 Cranch, 157.

This act, however, need not be the execution of a writing. The appointment, if made in the presence of the tribunal charged with the duty of taking the bond and administering the oath of office to the appointee, may be by an oral announcement by the judge of his determination. *Saunders v. Owen*, 12 Mod. 200; 2 Salk. 467. In the case cited the statute authorized the appointment of a clerk of the peace. The Earl of Winchelsea, who had the power to nominate, appointed Philip Owen, and evidenced that fact by a written instrument. The court doubted the validity of the grant, whereupon the said Earl orally announced the appointment, and Owen was admitted. Afterward, in a proceeding to oust him from office by a person claiming a subsequent appointment, the question as to whether the parol nomination was suffi-

cient was raised, and the Court of King's Bench unanimously held that it was.

The statute authorizing the appointment of a back-tax collector for Jefferson county provides that the appointment shall be made by the judge who usually holds the court charged with the duty of inducting the appointee into office. Ordinarily, therefore, the production of a written memorial of the appointment would be entirely useless, and there is nothing in the act from which it can be inferred that the legislature intended that the execution of a writing of any kind should be necessary to complete the appointment and invest the person appointed with the right to the office.

Field claims that he was appointed to the office on the 3d day of March, 1873. The evidence before us shows that the county judge did decide to appoint him, and that he evidenced that decision by open and unequivocal acts and by oral statements publicly made while the County Court was in session. It shows that the clerk of that court, with the knowledge and assent if not in obedience to the directions of the judge, administered to Field the oath of office, and attested a bond executed by him in open court.

We need not decide how far the failure of the judge to sign the orders of court entered of record on the 3d of March, 1873, affects the validity of the qualification of Field as an officer. Such failure in no wise affects his right to the office, as that right springs from the appointment, and not from any proceeding in court.

The appointment being complete and perfect, Field thereby acquired a right to the office for the term of four years, and he cannot be deprived of that right except for cause, and then only in the mode pointed out by law.

It results therefore that the *ex parte* order of April 29th, by which the County Court attempted to revoke his appointment, is void. And as there was no vacancy, existing on the 13th of May, 1873, at which time it is claimed appellant, C. C. Hoke, was appointed, and allowed to execute bond and take the oath of office, the action of the county judge touching such alleged appointment, as well as that of the County Court permitting Hoke to qualify as back-tax collector, was unauthorized, and consequently invalid for any and all purposes.

Having no right to the office, it is clear that appellant could not maintain against Field an action to prevent him from exercising it. His petition was therefore properly dismissed.

Judgment affirmed.

Moxley v. Ragan.

MOXLEY, appellant, v. RAGAN.

(10 Bush, 156.)

Exemption — agreement to waive invalid.

An executory agreement by a debtor to waive all benefit under exemption laws is against public policy and void.

ACTION to recover property sold upon execution. The opinion states the case.

Thomas Turner and Wm. H. Holt, for appellant.

Apperson & Reid, and C. Brook, for appellees.

PRYOR, J. The appellant, Josiah Moxley, being largely indebted, executed a conveyance to Hugh Britton in trust of all his estate, consisting of land and personalty, for the payment of his debts, reserving to himself by the terms of the deed such property only as was by law exempt from execution. The trustee proceeded to sell the property by reason of the trust, having first set apart to the appellant such articles of property as were by law exempt from sale, the latter being at the time a housekeeper with a family and entitled to the exemption. The appellee (Maupin), a creditor of the appellant, holding his note for five hundred and thirty-three dollars, upon which he obtained a judgment, had his execution issued and levied by the sheriff on this exempted property. The sheriff refusing to sell, he was indemnified by Maupin and required to make the sale. Before the sale took place this action was instituted by the appellant to recover the property.

The note upon which the judgment was obtained is as follows :

\$533.38.

MT. STERLING, KY., Nov. 1, 1871.

“One day after date I promise to pay to the order of Daniel Maupin five hundred and thirty-three dollars, without defalcation or discount, for value received, and without any relief whatever from the appraisement, exemption, or valuation laws of the State of Kentucky ; to bear ten per cent interest from this date.

(Signed) JOSIAH MOXLEY.”

The only question presented by the record is, can a debtor by the execution of a note containing such stipulations waive the benefit of the law exempting certain property from execution so as to preclude him

from afterward asserting his right to it. It is well settled that a debtor may sell his personal property exempt from execution either in payment of a debt or for any other valuable consideration, so as to vest in the purchaser the absolute title, or even to mortgage it, which is in effect a sale, to secure the payment of a debt.

There is an essential difference, however, between an executed contract, by which the owner is divested of title, and an executory agreement by which the debtor merely promises that in the future he will not take advantage of or claim the benefits of a particular statute. Executory agreements are generally enforced, and as much obligatory on parties as if in fact executed; but there are exceptions to this general rule. No one in this State is entitled to the benefit of the exemption laws but a housekeeper with a family, and the legislature certainly intended by the enactment of such laws to provide more for the dependent family of the debtor than the debtor himself. Every honest man has a desire to fulfill all his obligations, and such are always willing to comply with the demands of a creditor by giving to the latter any assurance he may exact as an evidence of his intention to pay his debt.

The law in its wisdom, for the protection of the poor and needy, has said that certain property shall not be liable for debt, not so much to relieve the debtor as to protect his family against such improvident acts on his part as would reduce them to want. Such is the policy of the law; and this contract was made not only in disregard of this policy, but to annul the law itself so far as it affected the debt sought to be recovered.

If such a contract is upheld, the exemption law of the State would be virtually obsolete, and the destitute deprived of all claim they have to its beneficent provisions. Suppose one should agree with his creditors that he would never take the benefit of the bankrupt law, or that, if he failed to pay a debt due on a certain day, his land should be forfeited and never after subject to redemption; can it be pretended that such contracts could be enforced?

It is true that authorities entitled to great consideration, holding a contrary doctrine to the views herein presented, are relied on in this case; but in our opinion the reasoning in those cases is not sound in principle or in accordance with a just and enlightened jurisprudence. It is maintained in these cases that the exemption of property from liability for debt being a *personal privilege*, the waiver of such privilege by contract containing stipulations that hold fast for the creditor every species of property the debtor may thereafter possess, which the law has exempted, is neither contrary to law nor forbidden by public policy. The right to plead the statute of limitations is a personal privilege; but

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will it be insisted that an agreement or promise never to plead the statute is binding? If so, the grocer and merchant, and all others engaged in the business affairs of life, would have only to agree with those who promise to pay, verbally or in writing, that the statute of limitations should never be relied on, or the claim to exempted property asserted, in order to render nugatory these wholesome laws, enacted for the peace and welfare of society and in accord with an enlightened public policy. "A contract fraught with such consequences to the family of the debtor is totally at variance with public policy, and therefore void." *Harper v. Leal*, 10 How. Pr. 283.

The stipulations contained in the note vested the appellee with no right to any of the debtor's property, nor can its recitals work an estoppel, as the one party knew, or is presumed to have known, as much of the law with reference to such a contract as the other. The agreement to waive this right is illegal and void; and, as said by DENIO, Justice, in the case of *Kneettle v. Newcomb*, "the law does not permit its process to be used to accomplish ends which its policy forbids, though the parties may by a prospective contract agree to such use." 22 N. Y. 249; affirming S. C., 31 Barb. 169; *Crawford v. Lockwood*, 9 How. Pr. 547.

The court below should have told the jury that this attempted waiver on the part of appellant was void, and having refused to do so, the judgment must be reversed, and the cause remanded with directions to award the appellant a new trial, and for further proceedings consistent with this opinion.

Maupin (the execution creditor) must pay the costs in this court, as the bond of indemnity protects the sheriff.

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(10 Bush, 190.)

Criminal Law — evidence of witness on former trial since deceased.

Upon the trial of an indictment the written statement in a bill of exceptions of the testimony of a witness on a former trial of the same case was admitted in evidence against the accused. *Held* error, the prisoner having a right under the constitution to meet the witnesses face to face.

INDICTMENT for murder. The opinion states the case.

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S. M. Bernard, White & Bunch, for appellant.

John Rodman, Attorney-General, for appellee.

PRYOR, J. The appellant, Henry Kean, was indicted in the Jefferson Circuit Court, charged with murdering one Avery. He has been twice tried and found guilty as charged, and the case is in this court the second time for revision. A witness by the name of Maddox, who testified on the first trial, died before the second trial took place. His evidence was embodied in a bill of exceptions prepared in the court below and considered in this court on the first appeal. On the second trial of the case, the one now being considered, the statements purporting to have been made by Maddox as contained in the bill of evidence were permitted, against the objections of the accused, to be read as evidence to the jury. It is now urged by appellant's counsel that the admission of this testimony was in violation of the twelfth section of the bill of rights, which provides that in all criminal prosecutions the accused hath the right to meet the witnesses face to face. The conviction of the accused in both instances was upon circumstantial testimony alone, and the learned judge selected to try the case in the court below, in overruling the motion for a new trial, delivered an able though not convincing argument in favor of the competency of the testimony admitted. Many authorities are referred to in behalf of the State sustaining the right of the Commonwealth to prove by other witnesses the statements of a deceased witness made under oath, in the same case and upon the same issue between the same parties. In this case Maddox had been once examined as a witness, and the whole current of authority is that in such a case those who were present and heard the statements of the deceased witness may testify as to what these statements were, if the witnesses so called are able to give the substance of all that was said by the dead witness when the latter testified. The requirement that the accused shall have the right to meet the witnesses face to face is thus complied with, and no constitutional right violated.

The question in this case is not whether the statements of a deceased witness on a former trial were competent, for this must be conceded, but has the accused been deprived of a constitutional right in permitting a written statement of what the deceased witness said to go to the jury. We think he has, and that a witness or witnesses should have been called to prove these statements without reference to what was contained in the bill of evidence. The evidence in a bill of exceptions may be read (when the witness is dead) in a civil action where a retrial has been

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ordered, but we have found no case where such testimony has been allowed in a criminal prosecution. The testimony of what a deceased witness stated is competent in either a civil action or criminal prosecution, but the mode of proving it is different. In a civil case either mode may be adopted, but in a criminal prosecution the statements must be proved by living witnesses who speak from their own recollection of what the deceased witness said. These witnesses are before the accused and the jury. The accused has the right to cross-examine and to know or ascertain from the witness that he is detailing in substance all that was spoken by the deceased witness; without this he is deprived of any oral examination, or of even knowing who is to testify against him. It is the presence of the witness that this provision of the bill of rights entitles the accused to have. The competency of the testimony when offered is with the court, but the right of the accused to see or confront the witness is an indispensable requirement.

In this case the evidence of the deceased witness was reduced to writing by one of the counsel for the accused from notes of the testimony taken by the judge presiding at the first trial. It is shown by this attorney that these notes were inaccurate. The judge is not called on to testify, or the right to cross-examine allowed in order that the accused may know how much of the testimony was omitted, or whether the attorney had embodied in the bill of evidence the substance of all the witness stated.

In this case others seem to have been charged with the commission of the crime in connection with the accused. His associations with these parties as to time, place, etc., as well as many other circumstances, are necessary to be shown by the Commonwealth in order to make an unbroken chain of testimony against the accused. A fact or circumstance proven on the first trial, and then regarded as immaterial by the court and counsel, might become of vast importance to the accused on the second trial, and therefore the necessity of having the witness before the jury in order that the accused may cross-examine.

Section 365 of the Code provides "that in making an exception only so much of the evidence shall be given as is necessary to explain it, and no more." This court has no power to reverse a judgment of conviction in a criminal case for the reason that the evidence does not authorize it. If there is any proof conducing to show the prisoner's guilt, the judgment must be sustained in this court, unless there has been some error of law to the prejudice of the accused committed during the progress of the trial, and for which this court, by the provisions of the Code, has the power to reverse. The court below therefore in making out a bill of

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evidence in a criminal case only gives so much of it as will enable this court to determine the questions of law arising on the facts, and would necessarily omit many circumstances or facts that were or might be of importance to the accused before a jury, and of but little consequence in this court.

The evidence in the case was taken down on the last trial, and adds nearly one thousand pages to the record, and it might well happen that the substance of all that was said by this witness was not contained in the bill of evidence. It is a constant occurrence for counsel on opposite sides to disagree as to what a witness has sworn to, both recollecting with equal clearness, and the court determining the issue between them more with the view of having the legal questions arising presented properly to this court than to get the substance of all the witness said. Even those who are present and favorably inclined to one party are very apt to make the language used by the witness conform to their own wishes, and hence the absolute necessity of giving to the accused, when his life or liberty is involved in the issue, the right of cross-examination. This right of the accused to confront the witness testifying against him is declared in both the Federal and State constitutions, and doubtless in the constitution of every State in the Union. A right indispensable to the citizen when his life or liberty is involved, and the admission of this silent witness is, in our opinion, in plain violation of the twelfth section of the bill of rights. 5 Ohio, 354; 10 Hum. 486; *Walston v. The Commonwealth*, 16 B. Monr. 15.

It is maintained by counsel for the State that the evidence, conceding it to be incompetent, did not prejudice the rights of the accused. The persistency of counsel for the State in the court below in having it before the jury, as well as the importance attached to the question by the judge presiding at the trial, is sufficient evidence of its importance without analyzing the testimony to show it. It is also insisted that as the admission of incompetent testimony was not made a ground for a new trial in the court below, this court has no jurisdiction over the question. This question has heretofore been decided in the case of *Johnson v. The Commonwealth*, 9 Bush, 224.

The instructions given contain, in substance, the law of the case. Instruction No. 4 is rather an argument upon the effect of a confession than an instruction to the jury: as an abstract proposition of law it cannot be questioned, but in its application to the facts of a case we doubt whether a jury should be told that a confession voluntarily made was among the most effectual proofs in the case. The confession had been permitted to go to the jury, and they should have been left to consider it in connection

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with the other testimony in the case. The caution given juries in receiving proof of verbal confession has always been held proper by reason of the humane and merciful considerations to which the accused is always entitled when on trial upon an issue involving his liberty or life.

No reversal would have been had, however, by reason of this instruction, as we are well satisfied the substantial rights of the accused were not affected by it. The other objections made to the rulings of the court are not available, even if such rulings were erroneous, as they are questions over which this court has no revisory power.

It is proper to suggest that in impeaching the character of a witness, by showing that he is not entitled to credit on oath, proof that his family or associates are in bad repute is clearly incompetent. It is the general character of the witness assailed that is in issue, and not that of his family.

We have examined this large record carefully, and refrain from expressing, as we have no right to do so, an opinion as to the guilt or innocence of Henry Kean; but whatever his condition in life may be, or the circumstances surrounding him, he is entitled to a fair and impartial trial and the maintenance of his constitutional rights.

The judgment of the court below is reversed, and cause remanded with directions to award to the appellant a new trial and for further proceedings consistent with this opinion.

 ELIZABETH, LEXINGTON AND BIG SANDY RAILROAD CO v. COMBS.

(10 Bush, 382.)

Railroad — location of, upon street — damages to adjacent property — rule as to — measure of.

The use of a street as a site for a railroad track does not give a right of action to the owners of adjacent lots, unless it materially hinders the ordinary use of the street; but when such use does unreasonably abridge the right of lot owners to use the street as a means of ingress and egress an action for damages will lie against the railroad company.

Where the houses adjacent to a street used as the site of a railroad track are damaged by having smoke, soot or fire from passing engines thrown or blown into or against them the owners thereof have an action therefor.

The measure of damage to adjacent property caused by the use of a street as the site for a railroad is the diminution of the value of the property; and the recovery may include prospective as well as past damages.

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ACTION for damages. The following facts were stated by the court. The appellee being the owner of a lot of ground in the city of Lexington, extending from Main street back to the center of a small creek called "Town Fork," granted a part of his lot next to the creek to the city, and the mayor and council proceeded, pursuant to the grant, to lay out and construct thereon a street called Water street, which has been kept open and used as a common highway of said city since about the year 1833.

Continuing to own and occupy the ground between Main and Water streets, the appellee in 1868 erected four double tenement-houses, fronting on Water street and extending nearly to the line of the street, which he rented for between eight and nine hundred dollars per annum.

In 1869 the General Assembly passed an act incorporating the Elizabethtown, Lexington and Big Sandy Railroad Company, with authority to construct a railroad from Elizabethtown through Lexington to a point on the Big Sandy river near its mouth; and in December, 1871, the mayor and council of Lexington granted to the railroad company the right to construct its road over Water street in front of the tenement-houses of appellee. The road having been built and put in operation, this action was brought by appellee to recover damages for injury thereby done to his property.

Assuming that he was still the owner of the ground occupied by the street to the extent of his abutting lot subject only to the use of the street for ordinary purposes, appellee alleged that appellant had unlawfully and without his consent entered upon his land and constructed its road over it, without making any compensation therefor; that by the construction and operation of the road, the street, which was the only way of ingress to and egress from his lot and houses, had been entirely or nearly entirely obstructed, so as to prevent him and his tenants from having the proper use and enjoyment of the street. He also alleged that the value of his lot and houses had been greatly depreciated by the obstruction of the street, by the close proximity of the road, and by the noise, soot, smoke, and blowing of whistles and steam by passing locomotives and trains, and by the danger of fire being communicated therefrom to his houses.

The appellant admitted that it had constructed and was operating its road along the street, and claimed the right to do so under its charter and the grant from the city; and alleging that it had used all proper care and skill in constructing and operating its road to avoid injury to the adjacent property, denied its liability for any damage resulting from the use of the street or the proximity of its road to property along the line.

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It also put in issue the appellee's title to the street and adjacent lot and houses.

There was evidence at the trial tending to establish the following material facts: that a stone wall had been erected along the margin of "Town Fork," and that the street lies between that wall and the line of appellee's lot, and is about twenty-three feet six inches wide; that the railroad is constructed so that the inner rail next to the lot is only five feet nine inches from his line, and that when a train is passing there is only three feet seven inches between the sides of the cars and the line, and that it is about fifteen feet from the inner rail to the wall of the houses, which would leave twelve feet ten inches between the walls of the houses and the walls of the cars of a passing train. These measurements of distances from the track and passing cars to appellee's line are based on the assumption that his line extends to the outer edge of the sidewalk, which is six feet wide; so that if his line does not extend further than the inner edge of the sidewalk, the distance from the rail to his line is eleven feet nine inches, and from the walls of passing cars to the line is nine feet seven inches. The width of the railroad track is not shown, but if it be assumed to be four feet eight inches, as stated in argument, the cars being nine feet wide, as the evidence shows, it is only ten feet eleven inches from the outside walls of passing cars to the stone wall next to the creek.

There is a street on the opposite side of "Town Fork" running parallel with it, and which may be reached from Water street by means of alleys running perpendicularly to Water street on each side of appellee's lot, and on each of which there is a bridge over the creek. These alleys enable appellee to get along either side of his lot, which is about one hundred and forty feet wide; and besides these and Water street he has no way by which he can reach that part of his lots on which the tenement-houses stand.

The track superstructure is sunk to the level of the street, except the iron rails, which rise three or four inches above the surface. Wheeled vehicles drawn by horses cannot pass or stand in Water street at any point in front of appellee's lot when a train is passing, but may conveniently pass at all other times by running the wheels on one side between the rails of the railroad track. The top of the smoke-stack of a passing locomotive is about on a level with the second-story windows, and smoke and fire from the engine are sometimes blown against the houses and in at the windows, and such is the apprehended danger from fire that responsible companies refuse to insure the houses.

The evidence was conflicting as to whether the vendible or rental value

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of the property had been depreciated by the construction and use of the road. The construction and use of the road have been skillful and careful, and no unnecessary injury has been done, and no injury of any kind was shown, except such as results from the nature of the use made of the street and the proximity of the road to the sidewalk and to the property of the appellee.

Verdict and judgment having been rendered for appellee, and appellant's motion for a new trial having been overruled, the case has been brought here for revision.

Breckinridge & Buckner, for appellant.

Leslie Combs and *D. J. Falconer*, for appellee.

COFER, J. [after stating the facts and deciding some unimportant preliminary questions.] The main question in the case arises out of the refusal of the court to give the following instruction asked by the appellant, viz.: "Mere inconvenience of egress and ingress is not such an obstruction as the jury can give damages for, and if they believe the defendant's road-bed is on a grade level with the street, and that the obstruction is of no greater or more dangerous character by the construction and operation of said road than is usual and ordinary in the construction and operation of railroads, then the plaintiff is not entitled to any recovery therefor."

This instruction was asked, and its correctness is sought to be maintained, on the idea that having authority both from the General Assembly and the mayor and council of the city to construct the road along the street, the appellant is not liable for any injury resulting therefrom not caused by its negligence, carelessness, or improper manner of building or operating the road. That there is a large class of cases in which no recovery can be had for injuries to adjacent property from the construction of public improvements on the streets of towns and cities is a doctrine well established, not only in this State, but elsewhere. *Keasy v. Louisville*, 4 Dana, 154; *Lexington & Ohio R. R. Co. v. Applegate*, 8 id. 294; *Louisville & Frankfort R. R. v. Brown*, 17 B. Monr. 772; *Newport & Cincinnati Bridge Co. v. Foote*, 9 Bush, 264; *Chapman v. Albany & Schenectady R. R. Co.*, 10 Barb. 360.

These cases all proceed upon the ground that the legislature may lawfully grant to corporations created for the benefit of the public the right to use the streets of towns or cities, because such use is not incompatible with the purposes for which streets are established, and that owners of lots abutting on streets hold them subject to the paramount right of the public to use the streets for any purpose not inconsistent with the uses

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for which they were dedicated. But it is equally well settled, both here and elsewhere, that the owners of lots "have a peculiar interest in the adjacent street which neither the local nor general public can pretend to claim — a private right in the nature of an incorporeal hereditament legally attached to their contiguous ground — an incidental title to certain facilities and franchises assured to them by contract and by law," and which are as inviolable as the property in the lots themselves. 8 Dana, 294; *Haynes v. Thomas*, 7 Ind. 38; *Rowan v. Portland*, 8 B. Monr. 232; *Le Clercq v. Gallipolis*, 7 Ohio, 217; *Cincinnati v. White*, 6 Peters, 431.

And in view of this private right of lot-owners in the adjacent street this court has said, in discussing the subject of the conflicting rights of lot-owners and railroad companies operating their roads on the streets by legislative authority, that if it should appear that such use was being made of a street as "encroaches on any private right, or obstructs the *reasonable* use and enjoyment of the street by any person who has an equal right to use it, we shall be ready to enjoin all such wrongful appropriation of the highway." *Lexington, etc., R. R. Co. v. Applegate*, 8 Dana, 310.

It being conceded that the owners of adjacent lots have a peculiar private right in the street which is appurtenant to their lots, and is as much property as the lots themselves, we cannot escape the conclusion that there may be such an appropriation of the street as will give the lot-owner a private right of action against those who so appropriate it as to exclude him from its reasonable use, although such appropriation may be expressly authorized by the terms of legislative and municipal grants. The private right of the lot-owner in the adjacent street being conceded to be property, such appropriation or obstruction of the street as deprives him of its reasonable use deprives him to that extent of his property, and no reason is perceived why this species of property can be taken without just compensation rather than any other.

It was said by this court in *Louisville v. Louisville Rolling Mill Company*, 3 Bush, 416, that "private property is too sacred and the rights of citizens are too well guarded under our constitutional form of government to be sacrificed at the public behests without compensation."

While we mean to adhere to the doctrine heretofore recognized, that the use of a street as a site for a railroad track does not give a right of action to owners of adjacent lots, unless it materially hinders the ordinary use of the street, we feel compelled to decide, in consonance with unmistakable intimations in nearly or quite all the cases recognizing this doctrine, that when such use of the street does unreasonably abridge the right of lot-owners to use the street as a means of ingress and egress, an action will lie against the person or corporation guilty of usurping such

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unreasonable and exclusive use of streets for the recovery of such immediate and direct damages as the owner may sustain.

The case of *Hooker v. The New Haven & Northampton Canal Company*, 14 Conn. 151, is an authority in point. In that case the company constructed its canal under the direction of commissioners designated by the legislature, and as they directed. Water from waste-weirs made to protect the canal from injury by floods ran over the lands of intervening proprietors on to the land of the plaintiff and injured it. He sued the company, and defense was made on the ground that the canal having been authorized by law, and constructed according to the directions of those who were appointed by the legislature for that purpose, the defendant was not responsible in damages. But the court after an elaborate and able review of the cases held otherwise, saying it was not to be intended from any thing in the charter that the General Assembly meant to give power to the company to take away or essentially impair the rights of others for which they had made no compensation.

In *Stevens v. Proprietors of the Middlesex Canal*, 12 Mass. 466, 468, the court said, "If the legislature should for public advantage and convenience authorize any improvement, the execution of which would require or produce the destruction or diminution of private property, without affording at the same time means of relief and indemnification, the owner of the property destroyed or injured would undoubtedly have his action at the common law."

The same principle was recognized by Chancellor KENT in *Gardner v. The Village of Newburgh*, 2 Johns. Ch. 166, and by the Supreme Court of Indiana in *Evansville & Crawfordsville Railroad Co. v. Dick*, 9 Ind. 433.

As before remarked, the cases heretofore decided by this court bearing upon the question of the rights of lot-owners to use, and of railroad companies to occupy streets as sites for their roads under legislative and municipal grants are made to turn on the fact that, notwithstanding the use of the streets by the railroad companies, there was in each case not only ample room for vehicles on either side of the railroad track but for their passage in opposite directions.

In *Lexington & Ohio Railroad Company v. Applegate, etc.*, 8 Dana, 302. Chief Justice ROBERTSON said, "It must be an extreme and anomalous case in which an improved mode of transportation which not only facilitates passage but promotes trade and commerce in the city of Louisville could be deemed nevertheless a nuisance. It should never be so considered unless in its operations it *unreasonably* circumscribes and excludes the rightful use or enjoyment of Main street by others who have

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an equal right to use and enjoy it." Again he says, "Such a use of the street by the railroad company as did not *necessarily* disturb others in the use of it could not be considered a wrong," plainly implying that if such use *did necessarily* disturb others in the use of the street, it would be considered wrongful.

In *Louisville & Frankfort Railroad Company v. Brown*, 17 B. Monr. 772. the fact that the street ever since the erection of the wall on which appellant's road-track was laid had been well graded on either side, and vehicles could pass and repass on either side without inconvenience, was made prominent in the opinion, showing that the court attached great importance to it as affecting the right of recovery.

In *Newport & Cincinnati Bridge Co. v. Foote*, 9 Bush, 264, it is said, "The passage on each side of the approach to the bridge is of sufficient width for all the ordinary purposes of travel."

In *Cosby v. Owensboro & Russellville Railroad Company*, 10 Bush, 288, it was said the right to grant the use of streets to such public uses as are promotive of commerce and business for the general good of the town or city is limited only to the extent that it must not deprive the persons living on the street of its reasonable use as a passway for foot-passengers, horsemen, and the vehicles in ordinary and general use. The right to such a use in the street is property of which the owner cannot be deprived without compensation.

In this case the lot-owners as well as the general public are practically excluded from that part of the street in front of appellee's lot; for although trains only pass occasionally through the day and night, yet when they do come all other use of that part of the street is excluded, both from the character of railroad carriages and their inability to yield or give way to other vehicles when meeting or passing them.

The appellee can only reach the front of his lot on Water street with any kind of vehicle by choosing a time when no train is in the street, and must get out again before one arrives; and as he can never tell with certainty when this will be, it is impossible to escape the conviction that his use of the street and enjoyment of that right in it which is appurtenant to his lot, is practically destroyed; and to deny him a right of action against appellant would be a practical repudiation of that fundamental maxim of a free government which requires that the right to private property should be held sacred.

We therefore adjudge that if appellant's road has been so located as to deprive appellee of the means of ingress and egress to and from his lot on Water street with ordinary vehicles on either side of its road when its trains are passing or standing on the street in front of his lot, he

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is entitled to recover such damages as he has thereby sustained; and if his houses are damaged by having smoke, soot, or fire from passing engines thrown or blown into or against them, he is entitled to recover for this also. The diminution of the value of the adjacent property occasioned by these circumstances will be the measure of his right of recovery.

We have heretofore held in actions for injury to real estate by trespassers that the plaintiff can only recover compensation for the injury done up to the commencement of the action; but that was in cases of injuries not continuing and permanent in their character. The injury in this case, if any, is permanent and enduring, and no reason is perceived why a single recovery may not be had for the whole injury to result from the acts complained of.

The instructions given by the court are in the main correct as abstract propositions of law; but were erroneous and misleading, because they did not define to the jury what private right the appellee had in the street, or what would be an invasion of such rights, but left them to form their own opinions as to both. Nor did the court tell the jury what uses were and what were not incompatible with the purposes for which the street was established. The second instruction given for the appellee is also objectionable, because it couples the appellee's tenants with him, and allows damages to be given against appellant for inconveniences suffered by them.

For the errors indicated the judgment is reversed, and the cause is remanded for a new trial upon principles not inconsistent with this opinion.

WHITESIDES V. NORTHERN BANK OF KENTUCKY.

(10 Bush, 501.)

Alteration of bill of exchange.

Where the holder of a bill of exchange alters the acceptance thereof by the addition of a place of payment, the instrument is avoided as to all the parties to it not consenting to the alteration.

ACTION on a bill of exchange. The opinion states the case.

G. W. Whitesides, for appellant.

D. C. Walker and *Robert Rodes*, for appellee.

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LINDSAY, J. This action is founded upon the following instrument: "**\$1,569.**

OFFICE OF COLLIER, TAYLOR & CO., FRANKLIN, KY., *June 10, 1873.*

"Thirty days after date pay to the order of J. W. Whitesides fifteen hundred and sixty-nine dollars, and charge to account.

Yours respectfully,

C. P. TAYLOR.

To COLLIER, TAYLOR & Co., Franklin, Ky."

Across the face of the paper is written :

"Accepted, payable at First National Bank of Franklin, Ky.

COLLIER, TAYLOR & Co."

The bill was indorsed by Whitesides to the Northern Bank of Kentucky. After non-payment and protest said bank sued all the parties thereto. Whitesides, the indorser, answered. A demurrer was sustained to his answer, and as he failed to plead further, judgment was rendered against him, and he has appealed to this court, insisting that his answer presented a valid defense to the action.

He avers that after he had indorsed the bill, and after it had been accepted by Collier, Taylor & Co., and had been delivered to the appellee and the contract thereby completed, the bank caused to be written over the names of the acceptors the words, "Accepted, payable at the First National Bank of Franklin, Ky.," and that this was done without the knowledge or consent of himself or of said acceptors, or of either of them. He claims that this was a material alteration of the bill, and that it operated to relieve him from liability as indorser.

Under the general acceptance the holder of the bill was bound to present it for payment to the acceptors at their place of business. The qualified acceptance alleged to have been written over the names of the acceptors without their knowledge or consent authorized the holder to present the bill and demand payment at the national bank.

The acceptors had not contracted to place funds in the hands of that bank to meet the bill when due, and it may have been dishonored, notwithstanding their ability and willingness at the time it should have been presented to them at their place of business to pay it. The rule is "that an alteration of a general acceptance of a bill by the addition of a place of payment discharges the acceptor, if made without his privity." 2 Pars. on Notes and Bills, 548; *Burchfield v. Moore*, 3 Ell. & Bl. 683; 25 Eng. L. and Eq. 123; *Oakey v. Wilcox*, 3 How. (Miss.) 330.

The decision in the case of *Burchfield v. Moore* was approved by this

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court in the case of *Todd v. The Bank of Kentucky*, 3 Bush, 626. It was held in Todd's case, and in the case of *Roger v. Poston*, 1 Metc. 643, that when an accommodation indorser delivers an accepted bill to the acceptor to enable him to raise money by its negotiation, and he changes a general into a qualified acceptance by designating a particular place of payment, the indorser will nevertheless be bound to an innocent holder for value; but there is no intimation in either case that the holder may by a material alteration of the conditions of the acceptance release the acceptor and still hold the indorser bound.

The unauthorized alteration renders the instrument void, and it cannot be made the foundation of an action against any of the parties to it except such as may have consented thereto.

Upon demurrer, no inference unfavorable to appellant can be drawn from the fact that the acceptors served with process are interposing no defense to the action. The sufficiency of his answer must be tested by the facts therein stated, independent of the conduct of his co-defendants.

Appellant need not aver that neither he nor the acceptors of the bill ratified and confirmed the unauthorized alteration before the bill became due. He is not bound to anticipate the matters that appellee may or may not rely on to avoid the effect of his plea.

We are of opinion that appellant's answer presented a defense to the action. The judgment against him is reversed, and the cause remanded with instructions to overrule the demurrer and for further proper proceedings.

 WILSON v. COMMONWEALTH.

(10 Bush, 526.)

Criminal Law — escape.

A prisoner was convicted of a felony and appealed and afterwards escaped. Held, that he could not prosecute his appeal.*

INDICTMENT for murder. The opinion states the case.

P. B. Thompson, for appellant.

John Rodman, Attorney-General, for appellee.

* See to same effect *People v. Genet*, 17 Am. Rep. 315.

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COFER, J. The appellant, having been found guilty of the crime of murder and sentenced to be confined in the penitentiary for life, obtained leave to apply to a judge of this court for an order granting an appeal; and it appearing to the court before which he was tried that there was danger that he would escape from the jail of that county, the sheriff was ordered to transfer the appellant to the jail of Jefferson county for safe-keeping. On the way from one jail to the other appellant jumped from a window of the car in which he was being transported and made his escape, and is now at large.

The appeal having been granted, the attorney-general has entered a motion, based on an affidavit of the deputy sheriff from whose custody the appellant escaped, to dismiss the appeal on the ground that as the appellant is not in custody to abide such judgment as may be rendered, he has no right to prosecute the appeal.

It seems to us clear, both upon principle and authority, that the motion ought to be sustained. The court ought not to do a nugatory act; yet if we proceed to try this appeal, the appellant cannot be compelled to submit to our decision if it should be against him, and ought not therefore to be allowed to reap the benefit of a decision in his favor. He might thus be enabled to defeat the ends of justice entirely, for he may be able to keep beyond the reach of the officers until by the death or removal of witnesses or other causes his conviction upon a second trial would be rendered improbable, if not impossible. As he has chosen to undertake to relieve himself by flight, in contempt of the authority of the court and of the law, he cannot also invoke the aid of this court.

In *The State v. Rippon*, 2 Bay, 99, it was held by the Supreme Court of South Carolina that wherever corporal punishment was either probable or certain the defendant should be in the power of the court before they proceeded to hear a motion for a new trial; and the court refused to hear an argument on the motion, but directed that a bench-warrant be issued, that the defendant might be arrested and punished pursuant to the judgment.

In *Rex v. Teal and others*, 11 East, 307, two persons were jointly indicted for a misdemeanor, and were tried together and convicted; and upon an offer by one of them, who was then in court, to move for a new trial, the court inquired if both were present, and being informed that one was absent, refused to permit the motion to be made, because a new trial could not be granted to one without granting it to the other also.

The motion is sustained and the appeal is dismissed.

LOUISVILLE v. NEVIN.

(10 Bush, 549.)

Cemetery — lien on, for local improvements — sale of.

Cemeteries or graveyards will not be subjected to sale to satisfy liens on them for improvements of adjacent streets — especially where the disturbance of cemeteries or graveyards is made a penal offense by statute. (See note, p. 79.)

ACTION to enforce a lien. The opinion states the case.

T. L. Burnett, for appellant. Dillon on Municipal Corporations, § 616; Charter of 1870 of Louisville, § 7; *Broadway Baptist Church v. McAtee & Cassily*, 8 Bush, 518; *People v. New York*, 4 Comst. 419, 11 Johns. 77; *Baltimore v. Cemetery Company*, 7 Md. 517; *Dolan v. Baltimore*, 4 Gill, 394; *Pray v. Northern Liberties*, 31 Penn. St. 69.

Duke & Richards, and *R. J. Elliott*, for appellees.

COFER, J. The appellee, Nevin, brought this suit in the Louisville Chancery Court to enforce an alleged lien on a lot of ground on the south side of Jefferson street in said city for the price of regrading, recurbing, and repaving the sidewalk along the front of the lot.

The lot was conveyed by the city in 1834 to be held in trust for the use of the Roman Catholic congregation in Louisville as a burying-ground, and has been filled with graves for more than twenty years, and has never been used since 1834 for any other purpose than as a graveyard; and it is admitted that no revenue is derived from it, and that the Right Rev. Bishop McCloskey, who now holds the title as trustee, has no funds in his hands belonging to the trust with which to pay the assessment.

The sole question therefore is, whether the lot can be sold to satisfy the claim of the contractor for work, which is admitted to be a lien, unless the property is in some way exempted from it.

It is insisted for the trustee that the lot is exempt from assessment under section 10 of an act entitled "An act to tax railroads, turnpike roads, and other corporations in aid of the sinking fund," approved February 20, 1864. Myers' Supplement, p. 482. But we need not decide whether that act would have the effect claimed for it or not, as in our opinion the judgment dismissing the petition, so far as it was sought to sell the lot, must be affirmed upon a more obvious ground.

The lot having been completely filled with graves, and thus rendered

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useless for any other purpose than as a resting-place for the dead, unless their graves are to be desecrated by being built over or dug up, or by the use of the property for the ordinary purposes of town-lots, the chancellor would hesitate to lend his aid to subject it to sale. We know it has been intimated by courts for whose opinions we have a high regard that this is a matter of sentiment with which courts have nothing to do; but fortunately we are not reduced to the alternative to decree the sale of a graveyard already filled with the ashes of the dead, or of seeming to refuse to carry out the commands of the law.

The chancellor will not decree that to be sold which cannot be lawfully used for the ordinary purposes to which property of a like character is commonly applied, and especially when there is no imaginable beneficial use to which it can be put by the purchaser which would not subject him to punishment under the penal statutes of the State.

Section 26, article 17, chapter 29 of the General Statutes reads as follows: "Any person who shall willfully mutilate the graves, monuments, fences, shrubbery, ornaments, grounds, or buildings in or inclosing any cemetery or place of sepulture; or shall violate the grave of any person by willfully destroying, removing, or injuring the head or foot-stone, or the tomb over or the inclosure protecting any grave, or by digging into or ploughing over or removing any ornament, shrubbery, or flower placed upon any grave or lot, shall be fined not less than ten nor more than one hundred dollars, or imprisoned not exceeding six months, or both, as a jury may determine."

If the lot in question was sold, the purchaser could not use it for any of the purposes for which town-lots are ordinarily used without subjecting himself to the penalties denounced by the foregoing statute and making the court a *particeps criminis* in his offense.

If it be said that the purchaser must take care of himself, it will be a sufficient answer that the court ought not to offer that for sale which it will not allow to be used by the purchaser for any purpose that can be of the slightest value to him.

The city had complete authority to contract for the work, but had no authority to make it a charge on the abutting property, and is therefore liable to the contractor for the price of his work. *Murphy v. City of Louisville*, 9 Bush, 189.

Wherefore the judgment is affirmed.

NOTE.—Equity will prevent the invasion and quiet the possession of grounds appropriated to the burial of the dead, and in a proper case will restrain town officers from wrongfully laying out a highway through a cemetery. *Trustees v. Walsh*, 57 Ill. 363; S. C., 11 Am. Rep. 21.

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In *The Buffalo City Cemetery v. Buffalo*, 46 N. Y. 503, it was held that the cemetery association and not the lot-owners should be assessed for local improvements, and in *The Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506 (another case between the same parties), it was held that a statute exempting the lands and property of cemetery associations from "all public taxes, rates and assessments" did not apply to a municipal assessment to defray the expenses of a local improvement.

In New York, cemeteries are by statute exempted from sale on execution, Laws 1847, c. 85, § 1; but such a statute does not prevent the mortgaging of cemetery grounds nor a strict foreclosure of the mortgage. *Lantz v. Buckingham*, 11 Abb. Pr. (N. S.) 64; a mortgage of a burial lot is not void as against public policy. *Id.*

In *Kincaid's Appeal*, 66 Penn. St. 411; S. C., 5 Am. Rep. 377, it was held that the purchaser of a lot in a cemetery does not take any title to the soil; and an act of the legislature, directing the vacation and sale of the cemetery and the removal of the bodies, was decided not an unconstitutional infringement of the lot-owners' rights. That the purchaser of a lot acquires no title to the soil, but only the right of burying his dead, was also held in *Partridge v. First Church*, 39 Md. 631; *Windt v. The German Reformed Church*, 4 Sandf. Ch. 471; *Richards v. The Northwest Protestant Dutch Church*, 32 Barb. 42; *Howard v. First Parish*, 7 Pick. 138; Washburn on Easements, 515.

Whenever by lawful authority a cemetery ceases to be a place of burial, the lot-holder's right and privilege ceases, except for the purpose of removing the remains previously buried. Cases cited above.

All monuments and erections capable of being removed are the personal property of the lot-holder; and he has the right to remove them upon the grounds ceasing to be used for burial purposes. *Partridge v. First Church*, *supra*; *Barnes v. Barnes*, 6 Vt. 388; *Ashman v. Williams*, 8 Pick. 402; *Prince v. Case*, 10 Conn. 375. But if he does not remove them and the grounds are sold, he is not entitled to be compensated therefor out of the proceeds of the sale. *Partridge v. First Church*, *supra*.

The unlawful disinterment of a dead body is a misdemeanor and indictable at common law as an offense "highly indecent and contra bonos mores." *King v. Lynn*, 2 Tenn. 733; *Commonwealth v. Cooley*, 10 Pick. 37; *Kanavan's Case*, 1 Greenl. 226.

See as to the law of burials and as to property in dead bodies. *Pierce v. Swan Point Cemetery*, 14 Am. Rep. 667, and notes; also an elaborate note to *In re Bettisen*, 12 Eng. Rep. 656.—REP.

LOUISVILLE & NASHVILLE RAILROAD COMPANY v. GOODNIGHT.

(10 Bush, 552.)

Reward — for conviction of criminals.

Defendant offered a reward for the "capture and conviction" of each of certain criminals. Plaintiff captured two of them who confessed their guilt; but the indictments against them were dismissed at the solicitation of defendant's attorneys, in order to use them as witnesses against the others. *Held*, that plaintiff was entitled to the reward.

PETITION in equity. The opinion states the case.

John A. Finn and Russell Houston, for appellant.

G. W. Whitesides, for appellees.

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LINDSAY, J. In 1866 a band of armed men threw a train from the track of the Louisville & Nashville Railroad and robbed and otherwise maltreated the passengers. The railroad company offered a reward for the apprehension and conviction of the persons engaged in the outrage. The substance of the offer was "that the company would pay to the captors one thousand dollars for the capture and conviction of each of said parties for said offense, or the company would pay ten thousand dollars for the capture and conviction of all of said offenders."

These appellees, in company with other persons who are made parties defendant to this action, accepted and acted upon the offer of the company, and pursued, captured, and delivered to the proper civil authorities Stephen Cornwell and John Evans, both of whom, it is conceded, were engaged in the attack upon the train and in the robbery of the passengers.

In their petition appellees aver not only the facts necessary to establish the guilt of Cornwell and Evans, but state that they each in open court repeatedly confessed their guilt. They further charge that they were both regularly indicted, and were present in court when the prosecutions against them stood for trial; and that the company, through certain of its attorneys who were employed to assist in the prosecution of the persons arrested on the charges of attacking the train and robbing the passengers, procured the attorney of the Commonwealth to move therefor and the Circuit Court to dismiss the indictments pending against Cornwell and Evans; and they charge that this was done with the fraudulent intent and purpose of evading the payment to the captors of the rewards offered for their arrest and conviction.

The company denies all charges of fraud or bad faith in this regard. It also denies that it procured the dismissal of the two indictments, or that its attorneys procured their dismissal, and denies that its attorneys had authority to act for it in procuring the indictments to be dismissed and the prosecutions against Cornwell and Evans to be abandoned.

There is no evidence tending to establish bad faith on the part of the company or its attorneys; but we may here observe that, inasmuch as it was not necessary that appellees should charge and prove bad faith, the failure of the appellees to establish this immaterial averment does not militate against their right to recover.

If the conviction of the persons named was a condition precedent, it was a condition not to be performed by the parties who made the arrests; and if the happening of the event upon which their right to the reward depended was hindered or prevented by the act of the company, such hindrance was in law equivalent to the completion of the condition pre-

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cedent, and the railroad company is liable on its contract to pay the rewards, although it may have acted in the matter with the utmost good faith.

It is manifest from the record that Cornwell and Evans were both guilty, and that they would both have been convicted if they had been put upon trial. It is in proof that several persons who had been arrested and indicted were tried and convicted, and that there were others who had forfeited their bail-bonds by failing to appear for trial. Evans and Cornwell had been used by the Commonwealth as witnesses against those who had been tried and convicted, and as hopes were entertained that those who were still at large would ultimately be recaptured and brought to trial, the counsel employed by the company regarded it important that they (Cornwell and Evans) should not be rendered infamous by being convicted of felonies, but that their competency as witnesses should be preserved.

One of the attorneys testifies that at the time or term at which the indictments against these two parties were dismissed three of the parties charged with participating in the attack upon the train and the robberies attending the attack were at large ; that they were "regarded equally if not more guilty than any others of the party ;" and that they (the attorneys employed by the company) thought it expedient and proper not to try Cornwell and Evans, "but to endeavor to have the indictments against them dismissed, that they might be used in the prosecution of the fugitives should they again be captured." He says further, "We held a private consultation on the subject, and after arriving at the above conclusion we called W. B. Thompson, acting Commonwealth's attorney in these cases, into our consultation, and importuned him to consent to their dismissal for the reason above given." The same witness also states that, in his opinion, the motions to dismiss would not have been made except for the suggestions and importunities of the company's counsel.

It may be assumed as an established fact that the dismissal of the indictments against Cornwell and Evans was the direct and immediate consequence of the action of the company's attorneys. Such being the case, the question arises whether under their employment they acted within the scope of their powers and duties as attorneys and officers of the court in counseling, advising, and procuring these indictments to be dismissed.

It appears from the answer of the company that its attorneys were employed to prosecute, or to assist the attorney for the Commonwealth in prosecuting, all the offenders who had been captured. The employment by private persons of counsel to assist in the prosecution of parties charged with crime is tolerated upon the idea that counsel so employed

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will in good faith represent the Commonwealth. For the time being they are recognized by the court as its representatives, and are bound by their obligations as attorneys and officers of the court to labor honestly and earnestly to secure the conviction of the guilty; but they are also bound to respect the rights of the Commonwealth, and to act in accordance with their convictions as to the propriety and policy of prosecuting or dismissing an indictment. We must presume that the company, when it employed counsel to assist in the prosecution of the parties charged with being guilty of the attack upon its train, and of the robbery of its passengers, expected and intended that they should honestly and faithfully discharge the duties incident to the position in which they were placed by their employment. To the extent that they did so discharge the duties growing out of and necessarily incident to their employment they represented as well the railroad company as the Commonwealth, and the company is bound by their acts.

We must further presume that the public interest was subserved by the dismissal of the indictment against Cornwell and Evans, or at least those representing the Commonwealth, and the company in good faith believed that it was important to preserve their competency as witnesses in order that greater criminals might be brought to punishment.

The motions to dismiss were certainly made in good faith; and as they met with the approval and sanction of the court in which all the indictments were pending, and which was conversant with the facts attending the commission of the outrages upon the railroad and its passengers, they must be regarded and treated as expedient and proper.

It seems to us therefore that it necessarily results that in advising and procuring the dismissal of the indictments the attorneys of the company acted within the scope of their authority and in the discharge of a duty devolved upon them by the very nature of their employment, and hence it follows that they acted for and on behalf of the company. Such being the case, the company through its attorneys hindered and prevented the conviction of Cornwell and Evans, and it cannot escape the payment of the reward offered, upon the ground that they yet remain unconvicted.

The judgments rendered by the court below in the two causes of *Goodnight, etc. v. The Railroad Company* and of *Onedus, etc.*, against the same defendant, conform to our views of the law and they are therefore affirmed.

COFER, J., does not concur in this opinion.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

RUCKER, plaintiff in error, v. DONOVAN.

(13 Kan. 251.)

Stoppage in transitu — right of, after attachment by creditor — replevin by vendor.

Plaintiff sold goods to C. and delivered them to a carrier. Defendant, a constable holding an execution against C. levied on and seized the goods while in the carrier's possession and paid the freight-charges thereon. Plaintiff demanded the goods from defendant, without paying or tendering the amount of the freight-charges, and being refused, brought replevin. *Held*, (1) that plaintiff's right of stoppage *in transitu* was not terminated by the levy and seizure, but; (2) that the lien for freight-charges, to which defendant had rightfully succeeded, was prior to plaintiff's right, and that plaintiff could only bring replevin after discharging that lien. (*See note, p. 87.*)

ACTION of replevin by Donovan and another to recover possession of certain barrels of turpentine and coal oil.

Plaintiffs, merchants at St. Louis, sold and shipped said goods to one Conner & Co., of Fort Scott. While the goods were in the carrier's possession the defendant Rucker, as constable, seized upon them by virtue of an execution against Conner & Co., which he held, and having paid the carrier's charges thereon took the goods into his possession as such constable. Plaintiffs having demanded the goods of defendant brought this action and recovered judgment. Rucker brought the case up on error.

Hullett & McCleverty, for plaintiff in error.

O. French, for defendant in error.

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BREWER, J. This was an action of replevin brought by defendants in error in the District Court of Bourbon county. The testimony is not in the record, and the case is before us on the pleadings, the findings, and judgment. The petition alleges an absolute ownership. The findings show that the goods were in the possession of Rucker as constable by virtue of proper and legal process against the firm of L. E. Conner & Co. Plaintiffs' title was based upon an attempted exercise of the right of stoppage *in transitu*. The findings are, that plaintiffs at St. Louis sold the goods to Conner & Co., and shipped them to Fort Scott; that Conner & Co. were then insolvent, and that this insolvency was unknown to plaintiffs; that the goods never came into the possession of Conner & Co., but were taken by the constable from the carrier by virtue of his process; and that the constable paid the freight-charges, and also that plaintiffs demanded possession of the goods from the constable before suit, and while they were in his possession, but did not pay or tender the freight-charges. These are all the facts upon which the court based its conclusions of title and right of possession in the plaintiffs. The first finding shows a passage of the title from plaintiffs to Conner & Co.; and a reinvestment in plaintiffs of title and right of possession is claimed only by virtue of an exercise of the right of stoppage *in transitu*. Now, the mere insolvency of the vendee does not of itself amount to a stoppage *in transitu*; there must be some act on the part of the vendor indicative of his intention to repossess himself of the goods. 1 Parsons on Contr. 178; 2 Kent, 543, and cases cited in notes. Actual seizure of the goods before they come into the hands of the vendee is not essential. A demand of the carrier, or notice to him to stop the goods, or a claim and endeavor to get the possession, is sufficient. No particular form of notice and demand is required. See same authorities. This right can be exercised only during the transit, and before delivery, actual or constructive, to the vendee. But a seizure by an officer under legal process in favor of some other creditor does not destroy the right. *Smith v. Goss*, 1 Camp. (N. P). 282; *Buckley v. Furniss*, 15 Wend. 137; *Agiurir v. Parmelee*, 22 Conn. 473; *Wood v. Yeatman*, 15 B. Monr. 270. Demand must be made of the party in possession. It is not sufficient to make demand of the vendee. *Whitehead v. Anderson*, 9 M. & W. 519; *Mottram v. Heyer*, 5 Denio, 629. Applying these rules to the facts of this case and it appears that the transit had not ended; the goods were in possession of an officer holding legal process in favor of another creditor; demand was made of the party in actual possession. It would seem therefore that the right of stoppage *in transitu* was not gone, and that the plaintiffs took the necessary steps to assert that right. But it

is insisted by counsel that this stoppage *in transitu* is simply the exercise of a lien by the seller, and not a rescission of the sale; that the petition alleges absolute ownership while the findings only show the existence of a lien, a variance that is fatal to the action. It must be conceded that the great weight of authority supports the claim of counsel in reference to the nature of stoppage *in transitu*, though there is far from absolute unanimity on the question. But it does not appear that any objection was made to proof of this kind of interest in the property under the general allegation of ownership; no motion for a new trial was made, nor does it appear that the attention of the District Court was called to this variance, and it is one of those discrepancies which under almost any circumstances might properly be corrected at the trial by an amendment of the petition. As it does not appear by exception or otherwise that the findings are against the evidence, we could not order a new trial, but must direct the judgment that ought to be entered. It does not seem to us therefore that we ought to disturb the judgment upon that ground.

One question more remains for consideration. The constable paid the freight-charges when he took possession of the goods from the carrier. These charges were neither paid nor tendered to him before the suit was commenced. Who then had the right of possession at that time? Clearly the officer. The lien for charges was prior to the claims of creditors, or the rights of the vendor. 2 Kent, 541; *Oppenheim v. Russell*, 3 Bos. & Pul. 42. The carrier's possession could not be disturbed until they were paid. The officer was justified in paying them, and having paid them was substituted to all the rights of the carrier. Before his possession then could be disturbed he must be reimbursed the money by him thus advanced. Now, the gist of the action of replevin is the right of possession. *Town of LeRoy v. McConnell*, 8 Kan. 273. Of course, questions of title may also arise, but the action can never be maintained against any one having the right of possession. The constable having the right of possession was entitled to judgment. He should not be subject to the expenses of a litigation which was not rightfully commenced. The law will protect the possession in him until these charges are paid. Having retained the property, the value of this possession need not and could not properly be determined, nor could any judgment be rendered for the return of the property, or the recovery of the value thereof, or the value of the possession. All that could properly be done was to render judgment in his favor for costs. Such a judgment, upon this ground alone, we are compelled to direct the District Court to enter, and the case will be remanded for that purpose. We have in this opinion discussed questions other than the one necessary to be considered, in

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order that there might be no dispute hereafter as to the matters decided and disposed of between these parties by this case.

All the Justices concurring.

NOTE.—The right of stoppage is one highly favored in law. It is founded upon the equitable principle that one man's property should not be applied to the payment of another man's debts. Per Lord NOTTINGTON in *D' Aguila v. Lambert*, 2 Eden, 77. Benj. on Sales, § 828; 2 Kent, 542. The stoppage of goods *in transitu* does not rescind the contract of sale, and the vendee cannot recover back a partial payment made therefor. *Newhall v. Vargus*, 15 Me. 314. And if the vendee, after the stoppage, comply with the contract or pay the price of the goods, he may recover them. *Jordan v. James*, 5 Ohio, 88; *Bloxam v. Sanders*, 4 B. & C. 941; *Bloxam v. Morley*, id. 941. But the right of the vendor after stoppage *in transitu*, exceeds a mere lien, for he may resell the goods. *Langford v. Tyler*, 6 Mod. 162.

Who may exercise the right of stoppage in transitu?

The general rule is that the right belongs exclusively to a vendor. Per BAYLEY, J., in *Bloxam v. Sanders*, 4 B. & C. 948; per PARKE, B., in *Edwards v. Brewer*, 2 M. & W. 377. But the right sometimes exists where the contract under which goods were consigned was not strictly a contract of sale. It is sufficient that the one seeking to exercise the right stands substantially in the position of a vendor. *Snee v. Prescott*, 1 Atk. 245; *D' Aguila v. Lambert*, Amb. 399; *Inglis v. Usherwood*, 1 East, 515; *Bothlingk v. Inglis*, 3 East, 381. Thus where a correspondent abroad, in pursuance of orders from a merchant in this country, purchases goods on his own credit, and without disclosing his principal's name, and merely takes a commission on the price, he is considered the vendor for stopping the goods *in transitu* in case of the insolvency of the consignee, for there is no privity between the original owner and the insolvent. *Feise v. Wray*, 3 East, 93; *Tucker v. Humphrey*, 4 Bing. 516; *Patten v. Thompson*, 5 M. & S. 350; *Ogle v. Atkinson*, 5 Taunt. 759; *Ellershaw v. Magniac*, 6 Exch. 570; *Isley v. Stubbs*, 9 Mass. 65.

So where one pays the price of goods for the vendee, and takes from the vendee an assignment of the bill of lading as security for his advances, he may exercise the right of stoppage. *Gosseler v. Schepeler*, 5 Daly, 476.

An agent who purchases goods in his own name is in the position of a vendor, and has the right of stoppage *in transitu*. *Hawkes v. Dunn*, 1 Tyr. 413.

But the agent must pay for the goods, and not leave any liability for payment on the part of his principals, otherwise he is not entitled to stop *in transitu*. *Oakford v. Drake*, 2 F. & F. 493.

A mere surety of the price of the goods cannot exercise the right, even though he may be entitled to a commission on the amount of the goods, for there exists no primary liability for the price of the goods. *Siffken v. Wray*, 6 East, 371.

The right does not belong to one having only a *lien* upon the goods without any property in them. *Sweet v. Pym*, 1 East, 4; *Leuckhart v. Cooper*, 3 Bing. N. C. 99; *Morley v. Hay*, 3 Man. & Ry. 396; *Freeman v. Birch*, 3 Q. B. 492, n.

A principal who consigns goods to his factor may stop them on hearing of the factor's insolvency, even though the factor may have accepted bills, or advanced money on the faith of the consignment, for a factor has no lien on goods for a general balance, unless they come into his actual possession. *Kinlock v. Craig*, 3 T. R. 119; *Wright v. Campbell*, 4 Burr. 2047.

So one who remits money on a particular account, or for a particular purpose, may stop it; but it is otherwise in the case of a general remittance from a debtor to his creditor on account of his debt. *Smith v. Bowles*, 2 Esp. 578; or where the consignor is indebted to the consignee to the full amount of the value of the goods. *Clark v. Mauran*, 3 Paige, 373; *Wood v. Roach*, 1 Yeates, 177. But where A, being indebted to

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B, consigned goods to him with directions to sell them and apply the proceeds in payment of the account, and B had the goods insured on his own account, it was held that the goods could be attached *in transitu*, as the property of A. *Sproule v. McNulty*, 7 Mo. 62.

So the right may be exercised by the consignor of goods for sale on joint account of himself and the consignee. *Newsome v. Thornton*, 6 East, 17.

A person to whom a *bona fide* transfer of the bill of lading has been made may stop the goods. *Morison v. Gray*, 2 Bing. 260; S. C., 9 Moore, 484. But see *Waring v. Cox*, 1 Camp. 369.

So a person may exercise the right who has only an interest in, and a right to receive a certain portion of the goods, although he does not hold a bill of lading. *Jenkyns v. Usborne*, 8 Scott N. R. 505; S. C., 7 M. & G. 678.

Where the stoppage is effected by one who has, at the time, no right thereto, a ratification of his acts by the consignor, made after the *transitus* is ended, comes too late, for the ratification must be made while the transit continues, and under circumstances in which the ratifying party might himself lawfully have done the act which he ratifies. *Bird v. Brown*, 4 Exch. 786; S. C., 19 L. J. Exch. 154. But if a general agent of a vendor, without any specific authority, exercises the right, a ratification after the transit has ended will render the stoppage valid. *Hutchings v. Nunes*, 1 Moo. P. C. (N. S.) 243.

In *Reynolds v. Boston and Maine R. R. Co.*, 43 N. H. 589, the opinion was expressed that any agent, having power to act for the consignor, either generally or for the purpose of the consignment in question, might stop goods *in transitu* without particular authority. See *Bell v. Moss*, 5 Whart. 189; *Newhall v. Vargas*, 13 Me. 93.

Under what circumstances the right arises:

A consignor can stop goods *in transitu* only when the following two circumstances concur: (1) when he is wholly or partially unpaid, and (2) when the vendee has become insolvent or bankrupt, or so failed in his circumstances as to be unable to perform his part of the contract. The mere fact, however, that the vendee has failed to perform his contract will not give the right of stoppage. *Walley v. Montgomery*, 3 East, 585; *Wilmhurst v. Bowker*, 7 N. & Gr. 882.

Partial payment does not affect the vendor's right. *Hodgson v. Loy*, 7 T. R. 440; *Feise v. Wray*, 3 East, 93; *Van Casteel v. Bowker*, 18 L. J. Exch. 19.

Where the vendor has received bills of exchange or other security for the whole price, he may exercise the right, even though the bills have been negotiated and are still outstanding and not yet due. *Feise v. Wray*, *supra*; *Patten v. Thompson*, 5 M. & S. 350; *Holbrook v. Vose*, 6 Bosw. 76; and in *Edwards v. Brewer*, 2 M. & W. 375, it was held that a consignor who has received the acceptance of the consignee for part of the goods may stop them *in transitu*, and retain possession of them without tendering back the bill.

But where goods are sold and the order, note, or accepted bill of a third party is taken in payment without indorsement or guaranty, the right of stoppage does not exist. *Eaton v. Cook*, 32 Vt. 58; *Cowasjee v. Thompson*, 5 Moore's P. C. 165.

So the right exists where goods are sold on credit, which has not expired. *Inglis v. Usherwood*, 1 East, 515; *Bothlingk v. Inglis*, 3 id. 381; *Dixon v. Yates*, 5 B. & Ad. 345.

As we have already said the right of stoppage does not exist unless the vendee is insolvent. If the vendor acts under a mistake as to the insolvency the stoppage is not valid. *Constantia*, 6 Rob. 321. But it is not necessary that the consignee should be absolutely bankrupt or have been formally adjudicated a bankrupt. The fact that he is in embarrassed circumstances is enough. *Gibson v. Carruthers*, 8 M. & W. 329; *Mills v. Ball*, 2 B. & P. 557; *Edwards v. Brewer*, 2 M. & W. 375; *James v. Griffin*, id. 822.

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When goods are deemed to be in transitu.

The vendor's right of stoppage ceases when the transit ceases, or when the vendee or those who stand in his place have obtained possession. Some nice questions have arisen as to when the transit is at an end.

In the possession of a carrier.

Goods are considered *in transitu* while they are in the possession of a carrier, whether by land or water, until they arrive at the ultimate place of their destination, and are delivered into the actual possession of the vendee. *Stokes v. La Riviere*, cited 3 T. R. 466; *Nicholson v. Bower*, 1 E. & E. 172; *Morley v. Hay*, 3 M. & R. 696; *Coates v. Railton*, 6 B. & C. 422; *Lickbarrow v. Mason*, 1 Sm. L. C. 699 and notes; *Reynolds v. Boston and Maine R. R. Co.*, 43 N. H. 591; *Atkinson v. Colby*, 20 id. 154; *Correll v. Hitchcock*, 23 Wend. 611; *Harris v. Pratt*, 17 N. Y. 249.

It makes no difference that the carrier has been named or appointed by the vendee. *Holst v. Pennul*, 1 Esp. 240; *Jackson v. Nicholl*, 5 Bing. N. C. 508.

When a vendee sends his own cart or his own ship in charge of one acting under his orders, there is no right of stoppage after the goods are packed in the cart or stowed in the ship. *Blakey v. Dimsdale*, Cowp. 664; *Oyle v. Atkinson*, 5 Taunt. 759.

But a vendor who delivers goods into the vendee's own ship may restrain the effect of such delivery and preserve his right of stoppage *in transitu* by taking bills of lading for the goods to be delivered to his order or assigns. *Turner v. Liverpool Docks*, 20 L. J. Exch. 393; *Brown v. North*, 8 Exch. 1; *Jenkyns v. Brown*, 14 Q. B. 496; *Walley v. Montgomery*, 3 East, 589.

But in *Van Casteel v. Booker*, 18 L. J. Exch. 9, it was held, that in such a case the right of stoppage would continue only until the bill of lading, indorsed by the vendor, comes to the possession of the vendee. And if the vendee charter a ship, and the effect of the charter is to secure to the charterer only the exclusive use of the vessel, a delivery on board the vessel is not a delivery to the buyer, and does not terminate the right of stoppage. *Berneltson v. Strang*, L. R., 4 Eq. 481; *Sandeman v. Scurr*, L. R., 2 Q. B. 86; *Stubbs v. Lund*, 7 Mass. 453; *Newhall v. Vargus*, 13 Me. 105; *Aguirre v. Parmlee*, 22 Conn. 473.

But if the charter operate as a demise of the ship itself, a delivery on ship-board ends the right of stoppage. *Newberry v. Colvin*, 1 Cl. & F. 283.

Where goods are delivered to a vendee at a wharf, and he ships them there in his own name, the vendor cannot stop them. *Noble v. Adams*, 2 Marsh. 366; *Fragano v. Long*, 4 B. & C. 219.

Where goods are by the contract to be delivered to a carrier, named by the vendee, the vendor may preserve his right of stoppage by taking a receipt from the carrier, stating that the goods are shipped on account of vendor. *Craken v. Ryder*, 6 Taunt. 433.

But where the shipment is a complete delivery to the vendee within the terms of the contract, a receipt taken by the vendor will not continue his right to stop the goods. *Cocasjee v. Thompson*, 5 Moo. P. C. 165; *Evans v. Nichols*, 4 Scott N. R. 43; *Bryans v. Nix*, 4 M. & W. 775.

If bills of lading are taken by the vendor, stating that the goods are shipped on account of the vendee, the delivery is complete and the vendor cannot afterward stop the goods *in transitu*. *Meletopulo v. Ranking*, 6 Jur. 1095.

Where the goods sold are delivered on board a ship of the vendee's appointment, not to be transported to him nor delivered for his use at a place of his appointment, but to be shipped in his name to other markets, there is a termination of the transit and of the right of stoppage. *Newhall v. Vargus*, 13 Me. 105; *Rowley v. Bigelow*, 12 Pick. 307.

Where goods sold upon credit are in the custody of a warehouseman or wharfinger such custody is looked upon as of the nature of a transit

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Where a vendee was allowed to mark goods but not to remove them from the possession of the warehouseman, there being no delivery order from the vendor, this was held not sufficient to change the constructive possession of the goods by the vendor, and a sub-vendee to whom the goods were sold acquired no better right. *Dixon v. Yates*, 5 B. & Ad. 313; See also *Craven v. Ryder*, 6 Taunt. 433; *Small v. Moates*, 592.

The giving of a delivery order does not, without some positive act done under it, deprive the owner of his right to detain them for the price, even as against a *bona fide* purchaser from the vendee. *M'Ewan v. Smith*, 2 H. L. Cases, 309.

But if a delivery order authorize the transfer of the goods to the name of the vendee in the books of the warehouseman, the vendor's right of stoppage is terminated immediately upon such transfer. *Harman v. Anderson*, 2 Camp. 243. It was held in that case that the delivery order was sufficient even without an actual transfer being made in the books. See also *Lucas v. Dorien*, 7 Taunt. 279; *Tucker v. Ruston*, 2 C. & P. 86; *Keyser v. Suse*, Gow. 58; *Barton v. Bodington*, 1 C. & P. 207; *Re Hughes*, 12 Ir. Ch. Rep. 450.

The right of stoppage *in transitu* ceases when the entry of goods in a bonded warehouse is completed. *Cartwright v. Wilmerding*, 24 N. Y. 521; *Fraschieris v. Henriques*, 6 Abb. Pr. (N. S.) 251; but not until it is completed.

Where a wharfinger or warehouseman refuses to obey a delivery order, the *transitus* continues. *Lockington v. Atherton*, 8 Scott N. R. 38.

So where something remains to be done on the part of the vendor to ascertain the price or identity of the goods or the weight or measurement, the right of stoppage continues. *Hanson v. Meyer*, 6 East, 614; *Busk v. Davies*, 2 M. & S. 397; *Wood v. Tassell*, 6 Q. B. 234; *Tanner v. Scovell*, 14 M. & W. 28.

But where each article has been measured it is not necessary to the completion of the measurement that the total amount should be ascertained in order to prevent the right of property from passing. *Tansley v. Turner*, 2 Bing. N. C. 151; and see *Cooper v. Bill*, 34 L. J. Exch. 161.

So, where the identity and quantity of the goods are ascertained, and the weighing is merely for the satisfaction of the vendor, a delivery order will transfer the property and cut off the right of stoppage. *Hammond v. Anderson*, 1 B. & P. N. R. 69; *Swanwick v. Southern*, 9 A. & E. 900; *Whitehouse v. Frost*, 12 East, 614.

Delivery to an agent of the vendee.

Delivery to a servant or agent of the vendee who has authority to receive delivery ends the right of stoppage. *Valpy v. Gibson*, 4 C. B. 837; *Leeds v. Wright*, 3 B. & P. 320; *Scott v. Petitt*, id. 469.

So if goods are so far on their journey that they are in the possession of a third party—as a forwarder—awaiting orders from the purchaser as to their further transit, and if without orders they would continue stationary, the delivery is complete. *Dixon v. Baldwin*, 5 East, 175; *Hays v. Mouille*, 14 Penn. St. 48; *Gilford v. Smith*, 30 Vt. 49; *Higgs v. Bussy*, 2 Curt. 259.

Delivery to a wharfinger whose warehouse is used by the vendee as the depository of his stock, there to remain until disposed of, is a complete delivery. *Richardson v. Goss*, 3 B. & P. 119; *Wentworth v. Outhwaite*, 10 M. & W. 436; *Rowe v. Pickford*, 8 Taunt. 82.

But where the vendor delivers the goods to an agent of the vendee to be forwarded to the vendee, the *transitus* is not determined by their coming into the agent's possession. *Jackson v. Nichol*, 7 Scott, 585; 5 Bing. N. C. 508; *Markwald v. Creditors*, 7 Cal. 213; *Blackman v. Pierce*, 23 id. 508; *Aguirre v. Parmelee*, 22 Conn. 473; *Pottings v. Hecksher*, 2 Grant, 309.

The right of stoppage continues where goods have been sent by order of the vendee to a packer. *Hunt v. Ward*, cited 3 T. R. 467; but not after they have been repacked. *Leeds v. Wright*, 3 B. & P. 320.

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The transit continues until possession be taken by the vendee *as owner* of the goods; if there be constructive possession only, it becomes a question of evidence as to the purpose for which the agent holds possession. If they are received for the purpose of being held on behalf of the vendee as owner, the transit is determined, but not otherwise. *James v. Griffin*, 1 M. & W. 20; 2 id. 623; *Morley v. Hay*, 3 Man. & Ry. 396; *Whitehead v. Anderson*, 9 M. & W. 518; *Harris v. Pratt*, 17 N. Y. 249; *Buckley v. Furniss*, 15 Wend. 137.

Effect of partial or conditional delivery.

The right of stoppage continues, though some parcels of the goods have reached the vendee, if the vendor had no intention that a partial delivery should operate as a delivery of the whole. *Buckley v. Furniss*, 15 Wend. 137; *Tanner v. Scovell*, 14 M. & W. 28.

Where, however, the contract is entire, a delivery of part is a delivery of the whole (*Slubey v. Heyward*, 2 H. Bl. 504), unless there be an intention to separate the part delivered from the rest, in which case the delivery is not complete. *Dixon v. Yates*, 5 B. & Ad. 313; *Tanner v. Scovell*, *supra*.

So, if the delivery be not absolute, but with a condition annexed — as that the vendee shall give security — the right of stoppage continues. *Bothlingk v. Scheider*, 3 Esp. 58.

Effect of taking delivery short of the ultimate destination.

If the vendee intercept the goods on their passage to him and take possession as owner, the delivery is complete, and the right of stoppage is gone. *Secomb v. Nutt*, 14 B. Mour. 324; *Mills v. Ball*, 2 B. & P. 457; *Wright v. Lawes*, 4 Esp. 82. In *Mills v. Ball*, Lord ALVANLEY said: "If in the course of conveyance of the goods from the vendor to the vendee the latter be allowed to exercise any act of ownership over them, he thereby reduces the goods into possession and puts an end to the vendor's right to stop them." See also *Whitehead v. Anderson*, 9 M. & W. 534; *Oppenheim v. Russell*, 3 B. & P. 42; *Mohr v. Boston & Albany R. R. Co.*, 106 Mass. 67, 72.

But a mere demand of possession by the vendee of the carrier before the goods reach their destination will not have the effect of a delivery. *Jackson v. Nichol*, 5 Bing. N. C. 508.

Termination of transitus.

The right of stoppage does not cease on arrival of the goods at the port of delivery, but continues until they come to the possession of the vendee, or of some one holding them for him as his agent. *Mottram v. Heyer*, 5 Denio, 629; *Correll v. Hitchcock*, 23 Wend. 611; *Harris v. Pratt*, 17 N. Y. 249. And where the vendee being bankrupt, his assignee went on board the ship and touched the goods, as symbolical of taking possession, it was held that this did not amount to an act of ownership on behalf of the assignor. *Whitehead v. Anderson*, 9 M. & W. 518.

A usage of land carriers to retain goods for a general balance of account between them and the consignees cannot defeat or affect the right of stoppage. *Oppenheim v. Russell*, 3 B. & P. 42.

But as is held in the principal case the lien of the carrier for the carriage of the particular goods is preferred.

When the right of stoppage *in transitu* exists it cannot be divested by any claim made upon the goods in their transit by process of attachment at the suit of the creditor of the consignee. *Smith v. Goss*, 1 Camp. 282; *Buckley v. Furniss*, 15 Wend. 137; *Wood v. Yeatman*, 15 B. Mour. 270; compare *O'Brien v. Norris*, 16 Mo. 122. But in *Sproule v. McNulty*, 7 Mo. 62, it was held that where A consigned goods to B, to be sold, and the proceeds applied to the payment of a debt due from A to B, an attachment *in transitu*, as the property of A was good against B.

Assignment of bill of lading.

If the consignee has indorsed the bill of lading to a third person, *bona fide*, for a valu-

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able consideration, the right of the consignor is divested, and there is no distinction in this respect between a bill of lading indorsed in blank and an indorsement to a particular person. *Lickbarrow v. Mason*, 2 T. R. 63; S. C., 5 Id. 686; *Haille v. Smith*, 1 B. & P. 570; *Walter v. Ross*, 2 Wash. 283; *Lee v. Kimball*, 45 Me. 172; *Haggerty v. Palmer*, 6 Johns. Ch. 437; *Boyd v. Mosely*, 2 Swan, 661; *Kemp v. Canavan*, 15 Ir. C. L. Rep. (N. S.) 216.

This is only true however of a bill of lading or other like negotiable and transferable instrument. Thus the delivery of a shipping note with an order on the wharfinger does not cut off the right of stoppage. *Akerman v. Humphrey*, 1 C. & P. 53.

And where the indorsee of the bill of lading is the vendee's factor, the consignee has the right of stoppage, even though the factor is under acceptance to the vendee in a general account. *Patten v. Thompson*, 5 M. & S. 350.

So the indorsement of a bill of lading without consideration or for the payment of the vendee's debts is ineffectual to cut off the vendor's right. *Harris v. Hart*, 6 Duer, 606.

So a sale by the assignee before the arrival of the bill of lading conveys no title. *Ilsey v. Stubbs*, 9 Mass. 65.

And where a bill of lading is obtained by fraud from the owner of the goods, a *bona fide* indorsee or transferee has no better title than the indorser had. *Dows v. Perrin*, 16 N. Y. 325.

In what manner the right may be exercised.

The exercise of the right of stoppage is so much favored in law that if the insolvency of the vendee should happen before the goods come into his possession, the vendor is justified in getting them back by any means not criminal. Per Lord HARDWICK, 1 Atk. 250. Equity will not however interfere by injunction to aid the stoppage. *Goodhart v. Lore*, 2 Jac. & W. 349.

The usual method of stoppage is by notice to the carrier of the title and purpose of the vendor, forbidding delivery to the consignee and requiring him to hold the goods subject to the vendor's order. No actual possession on the part of the vendor is necessary. *Northey v. Field*, 2 Esp. 613.

If the vendor delivers goods to a carrier to be conveyed to a vendee, and whilst they are *in transitu* the vendor gives notice to the carrier not to deliver them, but the carrier by mistake delivers them to the vendee, who disposes of them, it was held in *Litt v. Conoley*, 7 Taunt. 168, that the delivery, being incomplete, conveyed no property, and that therefore the vendor could recover in an action of trover against the assignee.

The notice of stoppage to be effectual must be given to the custodian of the goods, or to the principal, whose servant has them in charge; and it must be given at such a time, and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent delivery to the vendee, *Whitehead v. Anderson*, 9 M. & W. 510.

The vendee may himself stop the goods while in *transitu*, when he finds that he is unable to pay for them, by refusing to receive them. *Atkins v. Barwick*, 1 Str. 103.

But the power of rejecting the goods and rescinding the contract exists only when the goods are *in transitu*. *Bartram v. Farebrother*, 4 Bing. 479.—REP.

State v. Beebe.

STATE V. BEEBE, appellant.

(13 Kan. 589.)

Escape — aiding, when not unlawful. Bail — surrender of principal.

A statute provided that if bail desire to surrender their principal, they may procure a copy of the recognizance by virtue of which they may take him in any county.— The bail of J.L. who was charged with a felony, surrendered him, with his own consent, to the sheriff, but neither they nor the sheriff had any copy of the recognizance or any other written warrant to detain him. *Held*, that the sheriff's custody of J. L. was unlawful, and that aiding him to escape therefrom was no offense.

INDICTMENT for feloniously aiding a prisoner to escape. The opinion states the case. The defendant was convicted and appealed from the judgment entered on the verdict.

Tucker & Fisher, for appellant.

H. C. Sluss, for the State.

VALENTINE, J. The defendant was tried and convicted upon a charge for feloniously aiding a prisoner to escape. It seems that one Joseph Lowe was charged with the offense of assault with the intent to commit murder. He entered into a recognizance for his appearance at the next term of the District Court. Afterward, at his own request, he was delivered by his sureties to the sheriff of the county, and the sheriff gave the sureties a receipt therefor. The sheriff then delivered him into the custody of one John Nugent, to be guarded, and by agreement Lowe was to pay Nugent for his services. While in the custody of Nugent he escaped, and the defendant Beebe assisted him to escape by furnishing him with a horse with which to ride away. From the time Lowe entered into said recognizance up to the time he escaped, neither the sureties, nor the sheriff, nor Nugent, ever had any warrant of any kind, or any copy of the recognizance, or any other instrument in writing, for the detention, imprisonment, or custody of said Lowe. Under these circumstances, was the escape a felony? This is a difficult question. It is one upon which good lawyers may differ. It is one upon which we know that good lawyers do differ. We have therefore given the question a very careful consideration. We have searched the text-books and the reports, for something to throw light upon the subject, but have found nothing. The real question is, whether Lowe escaped from *lawful custody*. Now, there is no ambiguity in the language of the statute upon this subject. The statute plainly enough prescribes what shall be done in such cases in order to

place the person charged with the offense in lawful custody. But the difficulty arises in cases where the statute has not been fully complied with. May the accused be in lawful custody, although the statute, prescribing how he shall be placed in such custody, has not been complied with? Lowe was at liberty on bail, and no one had any right to restrain him of his liberty except in a particular manner. The statute provides that "When the surety desires to surrender his principal, he may produce [procure] a copy of the recognizance from the clerk, by virtue of which the bail or any person authorized by him may take the principal in any county within the State." Crim. Code, § 148. The sureties in the present case did not comply with this statute. They procured no copy of the recognizance from the clerk. The principal, however, voluntarily surrendered himself to them. But still it can hardly be questioned that if the principal at any time before he was delivered to the sheriff had refused longer to remain in the custody of his bail, and had chosen to depart therefrom, he could have done so legally, and without committing any offense. They could hold him as long as he voluntarily chose to remain with them, but when he chose to depart therefrom they could hold him no longer. After his voluntary surrender to his bail they transferred their custody of him to the sheriff, and, as we are inclined to think, they transferred nothing more. Then had the sheriff any more right to hold said principal in custody than his surety had? While he chose to remain with the sheriff, he was of course in the lawful custody of the sheriff; but when he chose to depart therefrom he was no longer in the lawful custody. The statute provides that "The bail must deliver a certified copy of the recognizance to the sheriff with the principal; and the sheriff must accept the surrender of the principal, and acknowledge it in writing." Crim. Code, § 150. Now the bail did not deliver to the sheriff any certified copy of the recognizance; and the sheriff had no such copy, nor any other written authority, by which to hold said Lowe when he escaped from Nugent. Even if we should be of the opinion that the bail impliedly (they did not do so expressly) authorized the sheriff to procure a certified copy of said recognizance, still the sheriff did not procure the same. Then what was there to prevent Lowe from escaping, if he chose to do so? There is no authority anywhere given to the sureties, on a criminal recognizance, to arrest their principal, or to hold him in custody, or to deliver him to the sheriff, without a copy of the recognizance; and there is no authority anywhere given to the sheriff to receive such principal, or retain him in custody, unless he is also furnished with a copy of the recognizance. If the sheriff can hold a person in custody under such circumstances, without such copy, it is by virtue

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of some authority not found in the statutes. Under our system of criminal jurisprudence we are of the opinion that no person can be deprived of his liberty on account of some criminal charge against him except by virtue of some written authority therefor, except in cases where the accused may be arrested before any warrant has ever been issued. But even in cases where the accused may be arrested without warrant, he must be immediately taken before a magistrate, and a complaint be filed against him, and a warrant issued wherewith to hold him, or the custody of him would become unlawful. But where a person has been arrested on a criminal charge, and afterward set at liberty on a recognizance, then he is as much entitled to his liberty as he ever was before, and cannot again be deprived of his liberty except by following the law. There can be no excuse for again arresting him, or holding him in custody without written authority. The sureties may take a certified copy of the recognizance when they execute the same; or they may require ample security from their principal before they become his bail. They have ample time to take every precaution necessary. Hence, we think they ought to follow the law. Before a man can be deprived of his liberty, even the forms of law should be complied with. In such cases even the forms of law become matters of substance. And it would hardly seem that a man should be charged with committing a felony for merely failing to recognize certain proceedings as valid and binding, where the proceedings themselves are not in conformity to law. And of course, if Lowe did not commit a felony in escaping, Beebe did not commit a felony in assisting him to escape. We have come to the conclusions we have in this case with some doubts; but our conclusions are, that the sheriff could not legally hold Lowe in custody against his will, except by having a certified copy of the recognizance as the law requires, and therefore that Lowe did not commit a felony in escaping, and therefore that Beebe did not commit a felony in assisting him to escape.

The judgment of the court below is reversed, and ~~case~~ remanded for further proceedings.

BREWER, J., concurs.

KINGMAN, C. J., dissents.

Clark v. Spencer.

CLARK V. SPENCER.

(14 Kan. 398.)

Usury — agreement not to plead — withdrawing plea of — amendment.

An agreement to withdraw the plea of usury is against public policy and cannot be enforced; but where a defendant, having once pleaded usury, withdraws the plea in consideration that the plaintiff will consent to a continuance, he ought not to be afterward allowed to amend by filing the same plea again.

ACTION to foreclose a mortgage executed by Clark and wife. The opinion states the case. The District Court gave judgment for plaintiff, and defendant appealed.

Hulett & McCleverty, for plaintiff in error.

Blair & Hill, for Marston.

Harris & Spencer, for defendant in error.

BREWER, J. This was an action to foreclose a mortgage given by George J. Clark and wife to the defendant in error. John J. Marston, a subsequent mortgagee, was also made a party defendant. The pleadings were completed by answers and reply. In the answer of George J. Clark the defense of usury was set up. After this, and on September 19th, 1873, there was filed among the papers in said case an agreement upon which this case turned entirely in the court below. It was as follows, after title of cause:

“It is agreed and stipulated by and between said parties, that said case shall be continued until the next term. In consideration of said continuance the defendant George J. Clark agrees to withdraw his answer from the files, and file a general denial only, and not to place or ask to be placed on file any further answer; and also agrees that in case of sale of the property described herein, that the plaintiff shall have the right to remain in said premises until the 1st of March, 1874, by paying \$20 per month after such sale.”

This stipulation was signed, “Wm H. Spencer, George J. Clark, Antoinette E. Clark.” Marston’s attorney indorsed the following upon said agreement: “I agree that this cause shall be continued till December Term, 1873,” which was signed, “C. W. Blair, Attorney for defendant Marston.” The case was thereupon continued to the December Term, 1873, and the terms of the stipulation complied with as to with-

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drawing answer and filing only a general denial. On December 17th, 1873, the defendants George J. and Antoinette E. Clark filed a joint and several motion for leave to file separate, amended and supplemental answers, setting up usury and a tender to the plaintiff of the amount due after deducting the usurious payments. The tender had been made December 16th, and since the filing of the then existing answer. The motion was overruled, and the filing of supplemental answer refused by the court. On the next day, December 18th, defendant Marston filed a motion for leave to file a similar supplemental answer, which was also denied. On December 29th, Geo. J. Clark filed another motion for leave to file supplemental answer, which was also denied, the answer setting up the tender only. Also, on said December 29th, defendants Clark and Clark filed a motion to strike from the files the agreement above quoted, which was also overruled.

The principal question in this case is on the refusal of the court to permit the filing of any new pleadings. It is insisted that the stipulation is void because of illegality of consideration, viz., an abandonment of a plea of usury, and an agreement not to make such plea thereafter, and that therefore the case is to be treated as though no such stipulation was in it; also, that upon the happening of any new matter, amounting to a substantial defense, since the filing of the existing answer, it is a right of the defendant to be allowed to file a supplemental answer setting up such new matter, the refusal of which right is sufficient ground for reversal of the judgment. And finally, if it be not a right of defendant to be allowed to file a supplemental answer in all cases of the happening of new matter, it was, under the circumstances of this case, an abuse of discretion for the court to refuse to allow one to be filed, such as should compel a reversal. It may be remarked that the object in the various answers and motions offered and made was to renew the once-abandoned plea of usury; for though the tender was a subsequent fact, yet the tender without the usury amounted to nothing. The note was a note of \$3,500. The amount of the alleged tender was \$2,935, so that if the plea of the tender had been allowed to be filed, and the tender proved as alleged, it would have constituted no defense except in conjunction with a plea of payment or one of usury. The subsequent matter was therefore of itself immaterial. And on the other hand if the plea of usury had been permitted, and sustained by the evidence, the amount of the judgment would have been no greater than the amount due at the time of the tender, for the usury law in force at the time of the contract forfeited all interest. The only difference would have been in the matter of a few dollars costs.

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The agreement to withdraw the plea of usury cannot be sustained. It is no better than an agreement not to plead it; and surely, if such an agreement could be sustained, a usurious loan would always be accompanied by an agreement not to plead the usury — a very simple if not effectual way of evading the law. In short, this case seems to resolve itself into this: If, after pleadings have once been filed, the District Court refuses leave to file an amended answer setting up the plea of usury, under what circumstances will this court hold such refusal error, and reverse the judgment? Neither party has the right, after pleadings have once been filed, issue joined, and the case ready for trial, to change the issues by filing either an amended or supplemental pleading. This can be done only by leave of the court; and the granting of leave is within the discretion of the court. Error will lie only when an abuse of that discretion is shown. This, so far as amendments are concerned, is familiar law. *Taylor v. Clendening*, 4 Kan. 524; *Davis v. Wilson*, 11 id. 74; *Douglas v. Rinehart*, 5 id. 392; *Spratley v. Ins. Co.*, id. 155. It is also true of supplemental pleadings. *Medbury v. Swan*, 46 N. Y. 200, Voorhies' Code, 3d ed., p. 357, § 177, and cases cited. It may be that, as supplemental pleadings embrace only subsequent facts, there can be fewer reasons for refusing to permit them to be filed; but still, like amended pleadings, they are within the control and subject to the discretion of the court. .

Was there any abuse of discretion on the part of the District Court in this case? Leave was asked to file amended and supplemental answers. What grounds therefor were presented? It will ordinarily be expected in such cases, where additional defenses are sought to be interposed, that some reason will be shown for not presenting them before — either that the party was ignorant of the facts, or that such facts constituted a legal defense, or that he was in some way prevented from setting them up. He is asking to change the issues, and some reason other than his own pleasure or convenience should be given. If this be the general rule, *a fortiori*, where a party with full knowledge of a defense intentionally omits to plead it, or having once pleaded it intentionally withdraws it, he ought not thereafter to be permitted to change the issues by pleading it. Especially is this true when he reaps some benefit from such omission or withdrawal, and more especially when such omission or withdrawal not only inures to his benefit, but also works injury to his adversary, and is the result of an express and separate agreement therefor with such adversary. This covers the case of the principal debtor. He knew of the defense of usury, he plead it and then intentionally withdrew the plea. By such withdrawal he obtained the benefit of a delay in judicial proceedings to

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compel payment by him of a debt, and to the same extent postponed any collection thereof by his creditor; and he made this withdrawal in consequence of an express and separate agreement therefor with such creditor. It is unnecessary to affirm the validity of the agreement, or assent that it was one which it was the right of the creditor and the duty of the court to enforce. It is enough that such an agreement was made, and that its consequent benefits and injuries were received by both debtor and creditor. True, the injury resulting from a loss of this defense may have more than counterbalanced the benefits of delay, though no positive assertion can be made on this point without a fuller knowledge of the circumstances and conditions of the respective parties; but he elected to take the latter and cannot complain if he is compelled to abide by his choice.

Again, the plea itself which he seeks to make has no especial claims upon the favor of the court. Many very respectable courts have declared it an odious and unconscionable plea, one which, though tolerated, ought always to be discountenanced. On granting to defendants leave to amend their answers it has often been only upon their stipulating not to set it up. *Fulton Bank v. Beach*, 1 Paige, 429; *Utica Ins. Co. v. Scott*, 6 Cowen, 606; *Lovett v. Cowman*, 6 Hill, 223. And while the better opinion is against such discrimination and denunciation (*Catlin v. Gunter*, 11 N. Y. 368), yet it is undoubtedly true that it has no especial claims upon the indulgence and favor of the court. All applications concerning it should be disposed of upon the same principles and in the same manner as those concerning other defenses. So far therefore from seeing any abuse of discretion in this ruling, as to the principal debtor, it seems to us to have been just what it ought to have been.

[The remainder of the opinion is not important.]

Judgment affirmed.

THE STATE ex rel. GRIFFITH v. OSAWKEE TOWNSHIP.

(14 Kan. 418.)

Constitutional Law — taxation for other than public purposes. Municipal corporation.

A statute authorized towns to issue bonds to raise money "for the purpose of providing the destitute citizens of such townships with provisions and with grain for seed and feed"—the object being to relieve farmers whose crops had been destroyed. *Held* unconstitutional, as not being for a public purpose.

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ACTION to restrain the officers of Osawkee township from issuing bonds under ch. 42, Laws 1865, "for relief purposes," pursuant to a vote of the electors of said township. An injunction was issued which was afterward dissolved, and the relator brought the case up for review.

D. H. Morse, J. H. Bennett and Williams & Burns, for relators.

H. Keeler and Martin A. Case, for defendant.

BREWER, J. But a single question is presented in this case for our consideration, and that is, the constitutionality of the act of the last legislature, entitled "An act authorizing townships to issue bonds for relief purposes." Laws of 1875, p. 53, ch. 42. The matter has been pressed upon our early attention and decision for these reasons: The time within which these bonds may be issued is limited, the purposes sought to be accomplished thereby must be speedily accomplished. An impression widely prevails, supported by an official opinion of the attorney-general, that the act is beyond the scope of the legislative authority, and that the bonds provided for in said act would, if issued, be destitute of legal obligation. Hence it is said, and with great propriety, that an authoritative decision is of public importance; that if the act be constitutional, such townships as desire may avail themselves of its benefits, and negotiate more easily and at higher figures the bonds they may issue, and that, on the other hand, if the act be unconstitutional no steps may be taken under it, the evil of repudiation be avoided, and other measures of relief be resorted to. Impressed with the force of these considerations, we have give the matter our early attention, and proceed now to state briefly the conclusions we have reached.

Two propositions may be considered settled: first, that taxation to be sustained must be for a public purpose; and second, that where municipal bonds are issued, whose payment is provided for solely by taxation, their validity depends upon the question whether the purposes to which the proceeds of such bonds are to be applied are public purposes. *Leavenworth County v. Miller*, 7 Kan. 479; *The Citizens' Savings and Loan Association v. The City of Topeka*, recently decided by the Supreme Court of the United States, 20 Wall. 655.* It is also conceded by counsel that the entire purpose, or, if there are several, and no rule of apportionment as to the application of the proceeds, that all the purposes must be public. In other words, that the legislature cannot validate bonds for private

* Given in note, 15 Am. Rep. 56.

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purposes by declaring that the authorities may apply an indefinite portion of the proceeds to some public purpose. With these preliminary remarks let us turn to the act in question, and see to what purposes the proceeds of the bonds authorized by it are to be applied. The first four sections provide for the amount of bonds that may be issued, their form, title, time, rate of interest, the limit of the price for which they may be sold, and the placing of the proceeds to the credit of the relief fund. The last clause of section four then reads: "*Provided*, that no part of such fund shall be used except for the specific objects hereinafter named." Sec. 5 is as follows:

"SEC. 5. The trustee, clerk and treasurer of such township, or a majority of them, shall, as soon as practicable, sell and dispose of the bonds issued by them under the authority of this act to the best possible advantage, and invest the proceeds, or so much thereof as in the judgment of said officers may be necessary, for the purpose of providing the destitute citizens of such townships with provisions and with grain for seed and feed; and the officers aforesaid shall distribute such articles of necessity amongst the destitute citizens of such township in proportion to their several necessities, under such rules and regulations as may be prescribed, in accordance with the provisions of the fourth section of this act: *Provided*, that no family shall receive more than seventy-five dollars in value."

The relief of the poor, the care of those who are unable to care for themselves, is among the unquestioned objects of public duty. In obedience to the impulses of common humanity, it is everywhere so recognized. Our own constitution but gives utterance to the universal voice when it says, "The respective counties of the State shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity, or other misfortune, may have claims upon sympathy and aid of society." Art. 7, § 4. It must be borne in mind however that the term "poor" is used in two senses. We use it in one sense simply as opposed to the term "rich." Thus we speak of the ordinary laborers, mechanics and artisans as poor people, without a thought of describing persons who are other than self-supporting. Indeed, the large majority of our people are poor people, and yet they would feel insulted to be told that they are objects of public charity. We use the term also to describe that class who are entirely destitute and helpless, and therefore dependent upon public charity. The dictionaries recognize this two-fold sense. Thus, Webster gives these definitions: "1. Destitute of property; wanting in material, riches, or goods; needy, indigent. It is often synonymous with indigent, and with necessitous, denoting extreme want. It is

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also applied to persons who are not entirely destitute of property, but who are not rich; as, a poor man or woman; poor people. 2. (*Law.*) So completely destitute of property as to be entitled to maintenance from the public." Now, when we speak of the relief of the poor as a public duty, and one which may justify taxation, we use the term only in the latter sense. We have no thought of asserting that because a man is not rich, or even because he has nothing but the proceeds of his daily labor, therefore taxation may be upheld in his behalf. Such taxation would be simply an attempt on the part of the State to equalize the property of its citizens. Something more than poverty, in that sense of the term, is essential to charge the State with the duty of support. It is, strictly speaking, the pauper, and not the poor man, who has claims on public charity. It is not one who is in want merely, but one who, being in want, is unable to prevent or remove such want. There is the idea of helplessness as well as of destitution. We speak of those whom society must aid, as the dependent classes, not simply because they do depend on society, but because they cannot do otherwise than thus depend. Cold and harsh as the statement may seem, it is nevertheless true, that the obligation of the State to help, is limited to those who are *unable* to help themselves. It matters not through what the inability arises, whether from age, physical infirmity, or other misfortune; it is enough that it exists. It is doubtless true, that in the actual administration of the poor-laws, many who are not properly entitled thereto receive public support; but failures in the administration of laws do not change the principles upon which they must rest. It is important to bear this distinction in mind, for, as will appear hereafter, it is really the former and not the latter class which is sought to be relieved under this law. It may be remarked in passing, that it was claimed by counsel as one of the objections to this act, that under the rule, "*expressio unius, exclusio alterius*," inasmuch as the constitution casts upon the respective counties the care of the destitute, there was an implied prohibition upon casting it elsewhere. Much might be said, and with great force, in support of this objection; but we do not care to decide whether it be well taken or not, much less to rest this case upon it, for such a decision might be construed as an implied recognition of the validity of the principle which we are constrained to believe cannot be sustained.

The purpose of the act, as expressed in the section quoted, is to provide the destitute with provisions and with grain for seed and feed. This legislation must be construed in the light of known facts. For reasons unnecessary here to recount, in some portions of the State last season there was a total, and in others a partial failure of the crops. It was

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generally understood that many farmers would come to this spring's sowing with little or no seed, and with stock weakened for lack of grain. To make good this lack is the evident purpose of the act, to provide grain for seed and feed. Its aim is not to furnish food to the hungry, clothing to the naked, or fuel to those suffering from cold. It is not the helpless and dependent, whose wants are alone sought to be relieved. If it were, the fact that many who are neither helpless nor dependent might obtain assistance through its administration, would be no valid objection to the constitutionality of the law. It contemplates a class who have fields to till and stock to care for, and purposes to help them with seed for their fields and grain for their stock, that thus they may pursue with better prospects of success their ordinary avocations. It taxes the whole community to assist one class, and that not for the purpose of relieving actual want, but to assist them in their regular occupations. These people are engaged in the business of farming. This business cannot be successfully carried on without seed, nor without stock strong enough to do the ordinary work. They are destitute of seed, and their stock require grain. Hence the tax upon the community. The principle would be the same if their supply of grain was sufficient, but through the prevalence of the epizooty, or some other disease, their stock had all died. Could a tax be sustained to purchase stock for their ordinary farm work? Or again, suppose some prairie fire, driven by a fearful wind, sweeps through a county, consuming its fences and farming tools: can a tax be sustained to supply this loss, and enable the farmers to prosecute their labors? Nor need the inquiry be limited to a single class. Were the carpenters or shoemakers, or any other industrial class, located in a separate quarter of a city, and their tools and stock in trade swept away by fire, could a tax be sustained to purchase new sets of tools and new stock in trade to enable them to re prosecute their business and secure support for themselves and families? No distinction in principle can be made between these different supposed cases, and the case at bar. They all rest upon this proposition, that a tax is laid upon the public to furnish to one class the means of carrying on its regular occupation. A further examination of this act will but strengthen the views herein expressed.

[The opinion here quotes the four succeeding sections of the act at length.]

These various provisions show that the idea of the legislature was not the relief of the helpless and dependent, but the assistance of a class temporarily embarrassed. The recipient is required to make oath that he is buying the aid for himself, and not on a speculation. He is to give a note for the amount received, and if a married man the note must also

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be signed by his wife. The note is to bear the same date and draw the same interest as the bonds, and the interest is payable at the same time as the interest on them. This note is to be a mortgage as well, and the most sweeping kind of a mortgage, too, embracing all the real and personal property of the maker, whether owned at the time of its execution or subsequently acquired. And finally, it is made the express duty of the township treasurer to see to the collection of this note, and to take all proper and needful action therefor. Nothing is contemplated but a loan, and a secured loan at that. The credit of the township is invoked to procure funds for the accommodation of a single class temporarily and through unexpected calamity embarrassed in the prosecution of its ordinary business. Can this be called a public purpose? Clearly not. It would doubtless relieve the temporary wants of that class, would enable it to enter upon the business of the year with increased hope and a reasonable expectation of ordinary success in that business, and thus indirectly result in great benefit to the general public. But a similar result would follow the success and prosperity of any other class in business. And if the principle be once recognized in its application to this class, who can tell how soon it may be invoked in aid of another? If one hundred farmers may receive seventy-five dollars each to assist them in their farming, why may not one hundred mechanics with equal propriety receive seventy dollars each to assist them in their business? or a single manufacturer who employs one hundred hands receive seventy-five hundred dollars to assist him in his manufacturing? A difference in amount makes no difference in the principle.

But it may be said that this legislation can be defended as preventive and anticipatory. To prevent the spread of disease quarantine regulations are enforced, and ships coming from certain places are with all their passengers detained in quarantine even when not a solitary case of sickness exists on board. To prevent ignorance in the voter, the child is compelled to be educated. To prevent crime in the man, the boy is sent to the reform school. To prevent the spread of fire, valuable buildings are pulled down and destroyed. Grant that these parties are not now helpless and dependent; that they are not a public charge. Unless they are able to make and harvest a crop they may become so the ensuing winter. Is it not the part of wisdom to expend a little now to purchase seed and feed, rather than run the risk of having them become paupers hereafter? Under the peculiar circumstances of this case, this argument is a strong one. We are not disposed to belittle the magnitude of the calamity, or make light of the hardships of those upon whom it has principally fallen. If we consulted simply our own feelings we should gladly approve of

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this, as of every effort to mitigate the severity of the blow. But, though this calamity is great, and though by reason thereof it may seem wise to appropriate out of the public funds a little now to guard against the risk of future want, yet the principle is dangerous and unsound. Let the doorways of taxation be opened, not merely to the relief of present and actual distress, but in anticipation of and to guard against future want, and who can declare the result? How certain must be the expectation of want? how nigh its approach? What efforts must the individual make to ward it off? May he do nothing, and demand that the public make provision to guard against the possibility of future suffering? Must widespread and general calamity precede the granting of such anticipatory relief, or is it enough that individual misfortune or indolence render probable the approach of want? The mere mention of these questions suggests the dangers which would follow the adoption of this as a rule of public conduct. But the attendant dangers of such a rule are not the sole or the controlling considerations. The relief provided in this act is only indirect, and contingent. There is no direct appropriation to meet future want. The appropriation is for present use, and the relief is contingent on the successful prosecution of the business of the recipients during the ensuing year. If the crop proves a failure, the public funds are lost, and no relief is secured. It is a speculation, which, however proper and reasonable for individuals, is not a legitimate part of public duty. The same principle would justify assistance to a mechanic destitute of tools, to enable him to purchase tools, and through their use in his regular calling prevent his becoming a public burden. Indeed, it would be difficult to deny its application in any case where by present assistance, either in the purchase of implements or stock in trade, the recipient might reasonably be expected to earn a subsistence in the prosecution of his regular business. We should expect to find but few authorities to throw any light upon this question. The case of *The Citizens' Savings and Loan Association v. The City of Topeka*, heretofore cited (15 Am. Rep. 56), decides that taxation cannot be invoked to assist private manufacturing establishments. The propositions laid down by Mr. Justice MILLER in reference thereto are broad. It matters not how great may be the necessities of such an establishment, or how much it may indirectly benefit the community, it cannot be aided by taxation. The same propositions were asserted by the Supreme Court of Maine in the case of *Allen v. Inhabitants of Joy*, 60 Me. 124; S. C., 11 Am. Rep. 185. That was a case of an attempted loan of the credit of a town to certain parties in consideration of their engaging in some manufacturing enterprises for their private emolument. In delivering the opinion of the court C. J.

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APPLETON uses this strong language : " But whether the money raised is to be distributed *per capita*, or loaned, can make no difference in principle. If towns can assess and collect money to be again loaned to such persons as the majority may select for such purposes as it may favor, with such security, or without security, as it may elect, property ceases to be protected in its acquisition or enjoyment. * * * If the loan be made to one or more for a particular object, it is favoritism. It is a discrimination in favor of the particular individual, and a particular industry thereby aided, and is one adverse to and against all individuals, all industries, not thus aided. If it is to be loaned to all, then it is practically a division of property under the name of a loan. It is communism incipient, if not perfected." But the case most nearly in point is that of *Lowell v. The City of Boston*, 15 Am. Rep. 39, recently decided by the Supreme Court of Massachusetts. In that as in this, it was the circumstance of a great public calamity, the Boston fire, and a praiseworthy effort on the part of the legislature to provide assistance for the sufferers thereby. An act was passed authorizing the city of Boston to loan its credit to assist in rebuilding the burnt district. But this was declared to be outside the purposes for which taxes could be levied, or bonds issued. We have been able to find nothing more in point than these authorities, and they all point in the same direction as the considerations we have heretofore adverted to.

It is with reluctance that we have reached the conclusion that this act cannot be sustained. But ours is an unmixed duty, to declare the law as it is, and not as we might wish it to be. Especially imperative is that duty when as in cases like the present there is in the surrounding circumstances a strong appeal to overlook permanent rules in favor of a present and pressing want.

The judgment of the court below is reversed.

At the Justices concurring.

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WILCOX V. ELLIS.

(14 Kan. 588.)

Tax on notes deposited out of State — mobilia personam sequuntur.

Plaintiff, a resident of Kansas, agreed to sell and deliver lands in Illinois to L., a resident of Illinois, upon the payment of notes executed by L. for the purchase-price and deposited with a third person in Illinois. *Held*, that plaintiff was not taxable in Kansas on the notes.

ACTION for an injunction to restrain Ellis, a county treasurer, from collecting a tax levied on \$6,000 assessed as personal property. The opinion states the case.

R. M. Ruggles, for plaintiff.

A. L. Redden, for defendant.

VALENTINE, J. The only question involved in this case is, whether the plaintiff Wilcox is liable to pay taxes on certain supposed personal property which he is supposed to own and possess in this State. The facts of the case are substantially as follows: "In the year 1868 the plaintiff agreed in writing to sell certain real estate he then possessed in the State of Illinois, to one Daniel Lovatt, for a price agreed upon between them, and Lovatt gave his notes for the amount, it being agreed that the notes were to be left at the bank of Charles F. Gill & Co. in the town of La Harpe, Hancock county, Illinois, and as fast as said Lovatt should make payment on said notes from time to time the plaintiff should convey to him a proportionate amount of said real estate. The plaintiff made no deed to Lovatt for said real estate at the time of the sale, nor did Lovatt give any mortgage to secure the payment of the notes or execute any other instrument of writing than the notes, and said agreement to sell, which he also signed. Before the plaintiff could be required to convey any part of the real estate to Lovatt, he (Lovatt) must have paid an amount equal to the value of eighty acres; and whenever an amount was paid equal in amount to the value of another eighty acres, then a conveyance was to be executed by plaintiff to Lovatt for such eighty acres; and so on, till all the land should be paid for. The payments were to be made one year apart; and should Lovatt fail in any payment he was to forfeit any payment made after the last preceding conveyance. Six thousand dollars remained unpaid on the 1st of March, 1872, and is the same \$6,000 placed on the tax-roll by the clerk of But-

ler county in said year as the personal-property assessment of said Wilcox. The land was to remain the property of plaintiff till the payments were made as before stated. The notes never had been in the State of Kansas, and never out of the State of Illinois, nor in any other place than the bank before stated. The contract or agreement to sell the lands between plaintiff and said Lovatt was in writing, executed by both parties, and contained substantially the conditions above set forth." The tax complained of was levied for the year 1872 on said \$6,000. The plaintiff was on the first day of March of that year and has since been a resident of said Butler county. "The land still unconveyed on March 1st, 1872, was of the value of \$6,000." Now we suppose that it will be admitted that it is not the intention of the laws of Kansas to attempt to collect taxes for general revenue except upon property, and except upon property within the jurisdiction of the State of Kansas. Hence, if the contingent debt coming from Lovatt to the plaintiff is not property in and of itself, and aside from the real estate for which it was incurred, or if it is not property within the jurisdiction of the State of Kansas, then it cannot be taxed in Kansas. Then what is there in Kansas to be taxed? Certainly no tangible property and not even any intangible property that needs any protection from our laws. Every thing is and has been in Illinois — the consideration for the notes, the notes themselves, the place of payment, the persons to whom the notes are to be paid, and presumptively the payors, and the funds which must be used in paying the notes, all are in Illinois and have never been in Kansas. Nothing pertaining to the notes, or to the debt which they evidence, has ever been in Kansas except that the owner of the notes resides in Kansas. Every act which brought the notes or the debt into existence was performed in Illinois, and every act that may be performed in the future for their collection, payment, or extinguishment, must also be performed there. The claim that said debt is taxable in this State is founded entirely upon the maxim, *Mobilia sequuntur personam*. Under this maxim it is claimed that movable property follows the *residence* or *domicile* of the owner (not his *person*), and therefore that personal property may be taxed at the residence of the owner wherever he may be, and wherever the property may in fact be. This maxim would seem from its terms to apply to all movable property, tangible as well as intangible, and it is generally so applied wherever it is applied at all. But the defendant desires to make a distinction. While he seems to admit that by the weight of judicial determination the maxim does not fully apply for the purposes of taxation to tangible movable property, yet he nevertheless claims that it does apply with all its force to intangible personal property. We think, however, he is mistaken.

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The weight of judicial authority seems to be that for the purposes of taxation the maxim does not fully apply even where the property is intangible. *People v. Gardner*, 51 Barb. 352; *Cathin v. Hull*, 21 Vt. 152 *People v. Trustees, etc.*, 48 N. Y. 397; and other authorities cited in plaintiff's brief. This maxim is at most only a legal fiction; and Blackstone, speaking of legal fictions, says, "This maxim is invariably observed, that no fiction shall extend to work an injury, its proper operation being to prevent a mischief, or remedy an inconvenience that might result from the general rule of law." 3 Blackstone's Com. 43. Now as the State of Illinois and not Kansas must furnish the plaintiff with all the remedies that he may have for the enforcement of all his rights connected with said notes, debt, etc., it would seem more just, if said debt is to be taxed at all, that the State of Illinois and not Kansas should tax it, and that we should not resort to legal fictions to give the State of Kansas the right to tax it. Where land is sold and conveyed, and notes given for the purchase money, we supposed the vendee may be taxed for the land and the vendor for the notes received for the purchase-money. But where the vendor still owns the land, and also owns it conditionally, as in this case, whether he can be taxed on both the land and the notes may be questionable. But that he should be taxed on both in Illinois, and on the notes in this State, would be highly unjust. In the case of *People v. Trustees, etc.*, 48 N. Y. 397, the following language is used by EARL, C. J., and concurred in by the full bench: "I am unable to see why the money due upon the land contracts must not be assessed in the same way. The debts due upon these contracts are personal estate, the same as if they were due upon notes or bonds; and such personal estate may be said to exist where the obligations for payment are held. Notes, bonds, and other contracts for the payment of money, have always been regarded and treated in the law as personal property. They represent the debts secured by them. They are the subject of larceny, and a transfer of them transfers the debt. If this kind of property does not exist at the place where the obligation is held, where does it exist? It certainly does not exist where the debtor may be, and follow his person. And while for some purposes in the law, by legal fiction, it follows the person of the creditor, and exists where he may be, yet it has been settled that for the purposes of taxation this legal fiction does not, to the full extent, apply, and that such property belonging to a non-resident creditor may be taxed in the place where the obligations are held by his agent." This decision would make the notes given in this case taxable at the banking-house of said Charles F. Gill & Co. This decision does not affect the taxability of notes where both the owners of the notes and

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the notes are in the same State, although in different counties. Nor would it give the power to an owner of notes to fraudulently send them out of the State for the purpose of avoiding taxation on them where they rightfully belong. This case has been very ably presented to this court by counsel on both sides, and for a full discussion of the questions involved we would refer to their briefs.

The judgment of the court below is reversed, and cause remanded with the order that judgment be rendered for the plaintiff on the agreed statement of facts, perpetually enjoining the said county treasurer from collecting said tax.

All the Justices concurring.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

JOHNSON v. THE TOWN OF IRASBURGH.

(47 Vt. 28.)

Sunday — unlawful traveling on — injury from defect in highway.

A person traveling on Sunday in violation of the statute cannot recover for injuries received by reason of the insufficiency of the highway.*

Where a statute forbids traveling on Sunday "except from necessity or charity," a necessity, to render traveling lawful, must actually exist — an honest belief that it is necessary is not sufficient.

ACTION on the case for injuries received by plaintiff while traveling on defendant's highway. Plea, the general issue.

On the trial it appeared that plaintiff having ordered from Boston some fish for himself and a neighbor, Barrows, took it from the station on Saturday, and on the Sunday following took part of it to Barrows, giving as his reason for going on Sunday that the fish was liable to injure unless put in a cool place. In returning from Barrows' plaintiff received the injury complained of. The court submitted to the jury to find specially whether it was necessary, in order to preserve the fish from taint or injury, that the plaintiff should make the journey on Sunday. The jury returned a general verdict for the plaintiff and a special finding that it was *not* necessary to make the journey on Sunday.

* See *Connolly v. Boston*, and *Gorman v. Lowell*, *post*, and *McGrath v. Merwin*, 17 Am. Rep. 119, and cases cited in the note thereto.—RFP.

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After verdict, the defendant moved for judgment for the defendant, but the court overruled the motion, to which the defendant excepted. When the court intimated its purpose of requiring a special verdict as to the necessity of taking care of the fish on Sunday, the plaintiff requested the court to instruct the jury to find whether the plaintiff honestly and fully *believed* that the fish would spoil or become much injured unless it was taken care of on that Sunday; but the court refused the request, and held that the response thereto would be immaterial: to which the plaintiff excepted.

J. T. Allen and *Edwards & Dickerman*, for plaintiff. It is insisted on the part of the defendant that the plaintiff cannot recover, for the reason that he was traveling on Sunday, in violation of section 3, chapter 93, of the General Statutes, when the injury happened to him. The plaintiff insists that that is no bar to his right of recovery. The case of *Sutton v. Town of Wauwatosa*, 29 Wis. 21; S. C., 9 Am. Rep. 534, very ably and fully sustains the plaintiff's position. And the same doctrine is sustained by the following cases: *Woodman v. Hubbard*, 5 Foster, 67; *Norris v. Litchfield*, 35 N. H. 271; *Morton v. Gloster*, 46 Me. 520; *Bigelow v. Reed*, 51 id. 325; *Hamilton v. Goding*, 55 id. 428; *Philadelphia, Wilmington & Baltimore R. R. Co. v. Philadelphia & Havre de Grace Steam-Towboat Co.*, 23 How. 209; *Mohney v. Cook*, 26 Penn. 342; *Baker v. City of Portland*, 58 Me. 199, 274; S. C., 4 Am. Rep. 274; *Kerwhacker v. Railway Company*, 3 Ohio St. 172; *Bird v. Holbrook*, 4 Bing. 628; *Steele v. Bucrhardt*, 104 Mass. 59; 6 Am. Rep. 191; *Hall v. Corcoran*, 107 Mass. 251; 9 Am. Rep. 30; *Barnes v. Ward*, 9 C. B. 392, 420; *Welch v. Wesson*, 6 Gray, 505; *Dimes v. Petley*, 15 Q. B. 276; *Bateman v. Bluck*, 18 Q. B. 870; *Spofford v. Harlow*, 3 Allen, 178; *Nodine v. Doherty*, 5 Am. Law Reg. (N. S.) 346.

The request of the plaintiff touching the special verdict, is, in substance, a request to charge the jury that if the plaintiff honestly and fully believed that the fish would spoil or become much injured unless they were taken care of on that Sunday, then it would be lawful for the plaintiff to take such measures to preserve the fish as he did take, and that the defendant would be liable if the plaintiff made out his case in other respects. But the court refused so to hold, and in substance ruled that the plaintiff's belief and views as to the necessity of taking care of the fish were immaterial, and were no justification for his traveling on Sunday.

We insist if the plaintiff fully and honestly believed that it was necessary to take care of the fish and preserve it from taint and destruction, it

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became his duty to take the course he did, as much as though an actual necessity existed, and that he would be justified in so doing, although in fact it should turn out that it was not necessary.

William W. Grout, for defendant.

Ross, J. The necessity which will excuse one for traveling on the Sabbath must be a real and not a fancied necessity. The statute reads, "No person shall travel on the Sabbath or first day of the week, except from necessity or charity." General Statutes, ch. 93, § 3. It is not an honest belief that a necessity for traveling exists, but the actual existence of the necessity, which renders traveling on the Sabbath lawful. Hence the court properly refused to instruct the jury as requested by the plaintiff. The jury, under proper instructions, have found that the traveling of the plaintiff, on the occasion when he received the injury, was not from necessity, and therefore unlawful. They have also found that he has suffered damage from injuries received by reason of the insufficiency of a highway which it was the duty of the town to keep in good and sufficient repair. On this verdict the defendant moved for judgment in its favor, which the court below, *pro forma*, overruled, and rendered judgment for the plaintiff, against the exception of the defendant. Thus the question is distinctly presented for decision, whether a town is liable for damages sustained through the insufficiency of a highway which it is legally bound to keep in repair, to one who is unlawfully traveling on such highway, or traveling on the Sabbath without a legal excuse. The question is, not whether the plaintiff is barred from recovering damages which he would otherwise be entitled to recover, because he was, at the time he received the injury, committing an unlawful act, or traveling at an unlawful rate of speed, but whether the town was under a legal duty to furnish him a safe highway to travel over, when, at that precise time, he was forbidden by law to travel over the highway. This precise question is now for the first time presented to this court for decision. In *Abbott v. Wolcott*, 38 Vt. 666, a question somewhat analogous was decided. The plaintiff in that case was injured from the springing of a bridge while he was trotting his horse upon it. The bridge was of such construction that, by law, the plaintiff was forbidden to drive faster than a walk thereon. The plaintiff might lawfully travel on the bridge, but not at the rate of speed he used. It was held he could not recover. The decision is put upon two grounds: first, that the plaintiff's illegal act in driving faster than a walk must have contributed to the springing of the bridge, and so contributed to the happening of the accident which caused

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the injury ; second, if this was not so, that inasmuch as it was conceded that "the bridge was good and sufficient, except in the matter of its springing when driven upon on the trot, and as the plaintiff had no right to use it in that manner, the town was under no legal obligation to provide a bridge for such use ; in other words, that the town had fully discharged its duty toward the plaintiff, in that it had provided as good a bridge as the law required, and that the accident happened and the injury was occasioned by the unlawful act of the plaintiff, or of one Carlyle, who was at the time also trotting his horse on the bridge, and not from any failure of the town to discharge its duty in the premises. The question at bar has arisen in other States, but the courts of those States have not been so fortunate as to arrive at the same solution of it. The courts of Massachusetts and Maine have repeatedly decided that a plaintiff could not recover under such circumstances. *Jones v. Andover*, 10 Allen, 18 ; *Bosworth v. Swanzey*, 10 Metc. 363 ; *Hinckley v. Penobscot*, 42 Me. 89 ; *Bryant v. Biddeford*, 39 id. 192. In some of the other States it has been held that the fact that the plaintiff was traveling on the Sabbath in violation of law did not relieve the town from its liability for damages sustained through the insufficiency of its highway. So far as I have had access to such decisions, they assume that the town was liable to the plaintiff for the insufficiency of its highway, and proceed to consider whether the unlawful act of the plaintiff relieved the town from such liability. *Sutton v. Wauwatosa*, 29 Wis. 219 ; 9 Am. Rep. 584, is one of the latest decided cases of this kind, and one on which the plaintiff especially relies. It therefore demands some consideration. In the opinion, which was delivered by Ch. J. DIXON, very many of the cases are reviewed. It assumes that the decision of the cases against the right of the plaintiff to recover rests either upon the ground that the plaintiff's illegal act of traveling on the Sabbath contributed to the happening of the accident, and for that reason deprived him of the right of recovery, or that the fact that he was engaged in an unlawful act at the time he received the injury bars his right of action. Both of these grounds are combatted earnestly, and, I think, successfully. It is difficult to maintain that the traveler's illegal act in such cases contributed to the happening of the accident. The insufficiency of the highway remaining the same and the traveler being at the place of the insufficiency under the same circumstances on any other day of the week, the same accident and injury would have befallen him. A contributory cause is one which, under the same circumstances, would always be an element aiding in the production of the accident. The fact that the traveler is unlawfully at the place of the accident does not contribute to the overturn of his carriage

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or to the production of the accident. The same forces and causes would have overturned the carriage or caused the accident as well on a week day as on the Sabbath; as well when the traveler was lawfully at the place of the accident as when unlawfully there. It is sometimes asserted that if the injured party had not been unlawfully traveling he would not have been at the place of insufficiency, and would not have received the injury. The same is true of all injuries on highways. The injured person must be present at the place of the accident in order to receive the injury. Whether he is lawfully or unlawfully there, when there, the same causes and forces produce the accident in the one case as in the other; and the fact that the injured one is present unlawfully is not a factor which contributes to the happening of the accident. Hence, the decisions against the traveler's right of recovery must rest upon some other basis than that his unlawful act, or traveling unlawfully, was a contributory cause to the happening of the accident within the legal meaning ordinarily attached to those words. Neither, as I think, can the fact that the party receiving the injury was, at the time of the injury, engaged in an unlawful act, deprive him of the right of recovery. If the plaintiff, at the time of the injury, had been profaning the name of Deity, he would have been engaged in an unlawful act; but no one would hold that such an act would bar him from recovering of the town if it were otherwise liable for the injury sustained. The town could not relieve itself from the consequences of its own wrong or neglect, by alleging the illegal act of the plaintiff. Punishments are provided for all unlawful acts, but their administration is not committed to the discretion of towns; neither has a town the right to add to the prescribed penalty the injuries resulting from its own wrongful act or neglect. The traveling by the plaintiff without excuse, on the Sabbath, was not an offense against the town, and it cannot excuse its wrong done to him, if wrong it be, by re-crimination. The allegation of a wrong done by a plaintiff to a third party never furnished a defendant a good legal answer for a wrong done by himself to that plaintiff. Several of the cases cited by the plaintiff sustain and illustrate this proposition.

There may be cases in which a party injured through the insufficiency of a highway while engaged in an unlawful act could not recover, and in which the unlawful act would be the remote cause of his inability to recover. It may be questionable whether a criminal party, like a thief, robber, or kidnapper, who should be injured while using a highway in transporting and securing the fruits of his crime, could recover for such injuries, though occasioned by the insufficiency of the highway, of the town ordinarily responsible for such insufficiency. In all such cases, I

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apprehend, his unlawful act would not bar the criminal party from sustaining an action which had once attached against the town, but that no such right of action would arise, because the town would be under no obligation to furnish him a safe highway for any such purpose.

I think it is quite clear, that the decisions against the rights of the plaintiff to recover in such cases, if sustainable, must rest upon some other ground. While I am quite ready to yield my assent to the reasoning of the learned judge who delivered the opinion in the case last cited, I am not so well satisfied that the opinion meets the real point raised for decision. As heretofore remarked, the question is not, is the plaintiff barred from recovering for injuries sustained through the insufficiency of a highway, and which he would otherwise be entitled to recover, because he was, at the time he received the injuries, engaged in an unlawful act, but was the town under a legal liability to furnish him a safe highway to travel on, at a time when he was, by law, forbidden to travel on it? The liability of towns for the sufficiency of their highways is wholly imposed by statute. The right of the traveler to recover for injuries sustained through such insufficiency is also conferred by statute. No such liability or right existed at common law. The duty and liabilities of towns in regard to their highways are due only to travelers, to that class who have the right to pass and repass thereon, and continue only so long as they are in the exercise of that right. When one ceases to use a highway for the purpose of passing and repassing thereon, the duty and liability of the town toward him, in regard thereto, cease. This has been repeatedly decided. *Stickney v. City of Salem*, 3 Allen, 374; *Richards v. Enfield*, 13 Gray, 344; *Blodgett v. City of Boston*, 8 Allen, 237; *Stinson v. Gardiner*, 42 Me. 248; *Orcutt v. Bridge Co.*, 53 id. 500; *Baxter v. Winooski Turnpike Co.*, 22 Vt. 124; *Abbott v. Wolcott*, 38 id. 666; *Sykes v. Pawlet*, 43 id. 446; 5 Am. Rep. 295; *Hayward v. Rutland*, unreported.

We do not think any good lawyer would contend that a town would be liable for damages sustained through the insufficiency of one of its highways, by a circus performer who might chance to pitch his tent and establish his ring on the highway, and who should happen to be injured while performing his feats of horsemanship or of lofty tumbling. In such a case the town would not be liable, because it would not be under any legal duty to provide him a highway for any such purpose. Many cases might be supposed in which the town would not be liable to one injured through the insufficiency of one of its highways, because the one receiving the injury would not be using it for a purpose contemplated by the statute, and hence the town would be under no duty toward him. As a town is liable for such injuries only by force of the statute, its liability

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must be limited to those cases in which the statute has imposed the duty upon it to provide a safe highway for the injured party in the particular use to which he was, when injured, putting it. It is competent for the legislature when creating this duty and liability, or subsequently, to prescribe the limitations thereof. It may be limited to a particular class of individuals, or to special occasions. Is it reasonable to suppose that the statute was intended to impose this duty and liability in behalf of a person who was forbidden to use all highways for the purposes of travel, and at a time when he was so forbidden to use them? Can he be a traveler within the purview of the statute who is forbidden to travel? The question is its own answer. The statute imposing this duty and burden was first enacted March 3, 1797. 1 Tolman's Stats. 452, § 13. The same has continued in force, with some immaterial modifications, so far as regards this question, to the present time. On the same March 3, 1797, was enacted the statute against traveling on the Sabbath, not exactly in its present form, but in substance the same. 1 Tolman's Stats., ch. 27, §§ 1, 6. Thus, at the same time, the duty was imposed upon towns to provide safe highways, and they were rendered liable for injuries sustained through the insufficiencies of such highways. All persons were forbidden to use them on the Sabbath except for certain purposes. The statute limiting their use furnishes the measure of the duty and liability imposed. In other words, the duty and liability imposed are co-extensive with the purposes for which persons can legitimately use the highways, and no greater. A statute which should forbid the use of highways for certain purposes, or on certain days, or in a certain manner, would limit the duty and liability of towns in regard thereto. The statute has limited the amount of load one may carry on a highway to 10,000 lbs. He who attempts to draw a greater load does it at his own risk, because when he puts himself in such a position, the town owes him no duty, and is under no liability for injuries received through the insufficiency of its highways. The plaintiff when injured was forbidden by law to use the highway, and by reason thereof the defendant town owed him no duty to provide him any kind of a highway, and therefore was under no liability for any insufficiency in any highway. So far as the town was concerned, he had no business to be at that place at that time; and hence he was there at his own risk. If he has sustained damages, they fall upon himself and not upon the town, because the statute has not made the town liable for them.

Judgment reversed, and judgment for the defendant to recover its costs.

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THE BRANDON MANUFACTURING COMPANY v. FRAZER.

(47 Vt. 88.)

Bankruptcy — plea of, as bar to action.

Action on promissory notes ; plea in bar that since the commencement of the action defendant had been adjudged a bankrupt, and that plaintiff had proved its debt in bankruptcy, and that the bankruptcy proceedings were still pending. *Held* bad on demurrer.

ACTION of assumpsit on promissory notes, commenced November 18, 1870. Plea, in bar, that on November 29, 1870, involuntary proceedings in bankruptcy were instituted against defendants, wherein on January 7th then next they were adjudged bankrupts and an assignee appointed ; that plaintiff proved its debt against them in bankruptcy, and that the bankruptcy proceedings were still pending. Plaintiff demurred to the plea.

The demurrer was sustained *pro forma*, and judgment was rendered for plaintiff. Defendant excepted.

Prout, Simons & Walker, for defendant.

Briggs & Ormsbee and E. J. Phelps, for plaintiff.

WHEELER, J. The first clause of the 21st section of the Bankrupt Act of 1867, as it stood before the late amendments, and when the judgment under revision was rendered, provided, " That no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt ; and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby." These provisions standing alone would be very direct and effective against maintaining any suit against a bankrupt upon a debt proved against his estate. But they are to be read in connection with the other provisions of the act, and not alone, and their effect is to be determined from the meaning of the whole. The act provides for a discharge to bankrupts, excluding corporations and joint-stock companies ; and also provides what the effect of the discharge shall be when granted. If the proceedings terminate without a discharge the bankrupt is liable to a judgment *in personam* upon any cause of action that existed before the bankruptcy, and is liable to have it satisfied out of his after-acquired property. *Fisher v. Currier*, 7 Metc. 427 ; *Haxton*

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v. *Corse*, 2 Barb. Ch. 506. This applies as well to proved debts as to those that are provable and not proved, and shows that proof of debts does not merge nor extinguish them absolutely, but only so suspends their vitality that no action can be carried to final judgment upon them during the pendency of the bankruptcy proceedings. The proof of debts must generally, if not always, precede the granting of a discharge; and full effect could not be given to the rights of a creditor to prove his debt and also to proceed against after-acquired property in case no discharge should be granted, if the bankrupt could, during the pendency of the proceedings in bankruptcy, that might terminate in a discharge and might not, plead the proof of the debt as a full bar to an action upon it.

The English bankrupt acts (49 Geo. 3, c. 121, § 14) provided that it should not be lawful for a creditor who had brought an action against a bankrupt upon a provable debt, to prove it, "without relinquishing such action," and that the proof of such debt should be "deemed an election by the creditor to take the benefit of the commission with respect to the debt so proved or claimed." In an action on such a debt, the bankrupt pleaded the proof of the debt in bar, and the plea was held good, and judgment rendered for the defendant. *Read v. Sowerby*, 3 Maule & Selw. 78. Afterward the same question came before the King's Bench again upon a similar plea, and notwithstanding the case of *Read v. Sowerby*, it was held that the plea was not a good bar. BEST, J., said: "To make it a good bar, the debt must be extinguished. Now here there was no extinguishment of the debt; for if the commission had been superseded the party would clearly have had a right to bring an action. The proper course in such a case for the party to pursue is, either to apply to the chancellor to expunge the debt, or to the court in which the action is brought to stay the proceedings." *Harley v. Greenwood*, 5 B. & Ald. 95.

Under the Bankrupt Act of 1841, which contained similar provisions, it was held; according to some authorities, that proof of a debt merely was not a bar to the claim. *Haxton v. Corse*, *supra*. The same doctrine has been held in several cases under the present act. *In re Rosenberg*, 2 Bank. Reg. 81; 8 Am. Law Reg. (N. S.) 242; *Hoyt et al. v. Freer et al.*, 4 Bank. Reg. 34; Bump on Bank. 375. On this argument, the late case of *Bennett v. Goldthwait*, 109 Mass. 494; S. C., 12 Am. Rep. 742, where it appears to have been held that proof of a debt in bankruptcy was a full defense to an action pending upon it at the time of proof, has been cited in behalf of the defendant, and carefully examined, on account of the great consideration always due to decisions of that court. That decision appears to have been largely made on the authority of some cases under the act of 1841, in which the learned judges in deciding them enunciated or gave

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countenance to such views ; but an examination of those cases shows that this question was not directly involved in any of them. In one of them (*Comstock's case*, 5 Law Reporter, 163), the question was whether a bankrupt in custody on a close-jail execution, was entitled to release on proof of the debt against his estate ; and what PRENTISS, J., said, was upon that question in holding that he was entitled to be immediately discharged from that custody. In another (*Everett v. Derby*, 5 id. 225), the point was, whether the pendency of a suit on one demand would prevent the plaintiff in that suit from proceeding in bankruptcy against the defendant on another demand ; and the remarks of WARE, J., were made upon that question. In another (*Humphreys v. Scott*, 31 Me. 192), the effect of a discharge, and not that of proof of a debt in bankruptcy, was involved. Notwithstanding the great respect to which the decisions of the court that made and the opinions of the learned judge that pronounced the decision in *Bennett v. Goldthwait*, are justly entitled, that decision, considered with the others that have been mentioned, does not satisfy this court that the construction there put upon that part of the Bankrupt Act is the correct one. No other case in which mere proof of a claim has been held to be a good bar has been produced in argument, and none other has been discovered, except *Read v. Sowerby*, before mentioned. *Ansonia Brass & Copper Co. v. New Lamp Chimney Co.*, 53 N. Y. 123 ; S. C., 13 Am. Rep. 476, has been referred to as impliedly giving countenance to such a plea by a bankrupt person, by holding that it would be bad for a bankrupt corporation, because the corporation could not be discharged. And Mr. Justice NELSON appears to have held that proof of a debt of a class that under section 33 would not be barred by a discharge, would not be a bar to a suit upon the debt. *In re Robinson*, 6 Blatchf. C. C. 253. But a person adjudged a bankrupt may not be discharged from any debts. Corporations are not distinguished from persons, nor debts not barred by discharge from those that are, in section 21 ; and if proof of a debt would not be a bar for a defendant that could not be discharged, it should not be for one who might not be discharged, while the question of discharge is pending. This section 21 does make a distinction between creditors who prove their debts and those who do not ; but not such as to show that the debts of the former are barred without a discharge, and of the latter, not. The act, as it stood before late amendments, left liens by attachment, that should be four months older than bankruptcy proceedings, unimpaired by the proceedings, if the creditor should choose to stand upon his attachment. Section 14. And if the creditor chose to so stand, he could have a judgment to hold the property attached, although the bankrupt should obtain and plead his discharge in bar of the action. *Stoddard v. Locke*, 48

Stiles v. Hitchcock.

Vt. 574. The intention of the act seems to have been, that an ordinary creditor who had commenced suit should not have the benefit of such a lien, and also prove his debt and share with the other creditors in the rest of the estate; and the distinction made in section 21, between those who prove their debts and those who do not, and providing that all previous proceedings and unsatisfied judgments therein, of a creditor who proves his debt, shall be surrendered and discharged by the act of proving it, appears to have been made to carry out that intention. *Oomstock's case, supra*. The previous proceedings of a creditor proving his debt, so far as they can in any way affect the estate of the bankrupt, are, doubtless, by the mere act of proof, discharged and surrendered; but the debt itself remains, as well as that of a creditor who does not prove, to await the result of the proceedings in respect to discharge. The debt, therefore, should not be barred by a judgment for the defendant upon a plea of it merely, but should be held in suspension until the termination of the proceedings in respect to the discharge, one way or the other.

The plea in this case sets forth proof of the debt merely, and is pleaded in bar of the action. The *pro forma* judgment that the plea was insufficient was correct.

On motion of the defendants the judgment is reversed, *pro forma*, and the cause remanded, with leave to withdraw the demurrer, and replead on the usual terms.

STILES v. HITCHCOCK.

(47 Vt. 419.)

Taxes — collector of, not obliged to give receipts.

A collector of taxes is under no obligation to give a receipt for taxes paid to him unless the statutes expressly requires it; and a custom to do so will not bind him.

ACTION of trover for a wagon. Plea, the general issue and notice of justification as a collector of taxes. It appeared at the trial that defendant, as tax collector of the town, demanded of plaintiff the amount of taxes legally assessed against him; that plaintiff refused to pay the money unless defendant would give him a receipt therefor, and that he thereafter took the wagon as a distress for taxes and sold it at public auction.

The plaintiff offered to show that it had been customary for years to

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give receipts for taxes, but the evidence was excluded. The jury rendered a verdict for the defendant.

Dunton & Veazey, for plaintiff.

W. H. Smith, for defendant.

POWERS, J. I. The jury have found the fact that the plaintiff insisted upon a receipt as a condition to his offer to pay his tax. This he had no right to do. The collector is under no obligation to give a receipt for taxes paid to him. The plaintiff refused to pay unless the receipt was given. This is equivalent to an absolute refusal to pay, and was a waiver of any right to the statutory notice of six days, required by section 8, chapter 84, General Statutes, to be given before making distress. *Downer Woodbury*, 19 Vt. 329; *Wheelock v. Archer et al.*, 26 id. 380; *Hurlburt v. Green*, 42 id. 316.

II. The evidence offered by the plaintiff to show that it had been customary for the collector to give receipts for taxes paid, was properly excluded. The duties of collectors in the collection of taxes are all prescribed by statute, and cannot be varied by custom. We find no error in the trial below, and the judgment is affirmed.

WILEY v. THE FIRST NATIONAL BANK OF BRATTLEBORO.

(47 Vt. 546.)

National banks — special deposits for Safe-keeping.

The taking of special deposits, to keep merely for the accommodation of the depositor, is not within the authorized business of national banks; and the cashiers of such banks have no power to bind them on any express contract accompanying, or any implied contract arising out of, such taking.*

ACTION on the case with a count in trover for certain United States bonds. Plea, the general issue.

The plaintiff's evidence tended to show that defendant was a national bank organized under the act of Congress of June, 1864, known as the "National Currency act;" that in January, 1869, he delivered, at their banking-house in Brattleboro, to S. M. Waite, the cashier, United States

* See *Ocean Nat. Bank v. First Nat. Bank*, post.

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bonds of the value of \$2,400, and received a written receipt therefor, a follows :

“THE FIRST NATIONAL BANK OF BRATTLEBORO.

“BRATTLEBORO, VT., Jan. 8, 1869.

“Lucius L. Wiley has deposited in this bank twenty-four ^{July 1, 1869}
hundred dollars of 5-20s, 1867, for safe-keeping, as a special ^{Jan. 1, 1870}
deposit. ^{July 1, 1870}
S. M. WAITE, C.” ^{Jan. 1, 1871}

That at the several dates minuted on the margin of said paper, he called at said bank and said Waite paid him the interest on said bonds and entered said memoranda on the margin of the paper; that in August, 1871, he presented said receipt to said Waite at said bank, and demanded said bonds of him; that said Waite did not then, nor had he since, delivered said bonds to the plaintiff; that some time before said demand was made, said Waite informed him that said bonds had been stolen the June before. The defendant offered no evidence, and declined to go to the jury with any question of fact, but asked the court to hold as matter of law that under said act of Congress national banks could not be held liable for special deposits; that said Waite could only bind himself, and not the bank, by the contract set forth in said receipt. No other question was raised by defendant.

The court, *pro forma*, declined to hold as requested, but directed a verdict for the plaintiff; to which the defendant excepted.

Field & Tyler and *E. J. Phelps*, for defendant.

C. N. Davenport, for plaintiff. The receipt offered in evidence contains a special undertaking to safely keep the bonds as a special deposit, and return them to the owner on demand. It is not a naked deposit, binding defendant only to slight care, and making it liable only for gross negligence. This contract requires ordinary care, and imposes liability for ordinary neglect. 2 Kent's Com. 564; 1 Pars. on Cont. 572, note s; *Spooner v. Mattoon*, 40 Vt. 300; Jones on Bailm. 48, 49, 50, 51; Story on Bailm., §§ 70, 71. Defendant's failure to deliver on demand puts it, *prima facie*, in the wrong, and casts upon it the burden of showing the circumstances which it claims excuse it. 2 Kent's Com. 566; Shearm. & Redf. on Negl. 11; Story on Bailm., § 213.

It is claimed that national banks have no right to receive special deposits, and, as a corollary, that having received them without right, they may convert them to their own use, and the law affords no remedy.

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Banks organized under the act to provide a national currency have "all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, *by receiving deposits*, by buying and selling exchange, coin, and bullion; by loaning money on personal security; by obtaining, issuing, and circulating notes according to the provisions of this act." Section 8 of the act: *National Bank v. Lamb*, 10 Am. Rep. 438; *National Bank v. Commonwealth*, 9 Wall. 353; *Van Allen v. Assessors*, 3 id. 573. "By receiving deposits," is meant special as well as general deposits. A subsequent section clearly shows this is so. "And after such default, etc., it shall not be lawful for the association suffering the same, to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, *and to deliver special deposits*." Section 8; *Bank v. Bank*, 14 Wall. 398; *Coffey v. Bank*, 2 Am. Rep. 488. Had not the power to receive special deposits been expressly conferred, in the absence of any prohibition, it would be implied from the course of business and the usages of trade. There is nothing illegal in that kind of business. It is as free from hazard, properly conducted, as any other banking business. It is profitable to banks, to be the custodians of their customers' government securities. Morse on Banks, 55. The doctrine of *ultra vires* never excuses corporations or individuals for grand larceny. "I had no business to receive your bonds, therefore I stole them," is an excuse that has never yet been effectual in a court of justice. Corporations are liable for every wrong of which they are guilty; in such cases the doctrine of *ultra vires* has no application. *Merchants' Bank v. State Bank*, 10 Wall. 645; *Leach v. Hale*, 7 Am. Rep. 112.

Waite, in receiving the bonds and giving the receipt, professed to act as cashier, and in behalf of the bank. His receipt as cashier binds the bank, if within the scope of his authority. Corporations act through their agents. Cashiers of banks are duly authorized agents for the transaction of such business as pertains to their office. Receiving deposits is peculiarly the business of cashiers. Story on Agency, § 114; *Minor v. Mechanics' Bank*, 1 Pet. 70; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Cooke v. State Bank*, 11 Am. Rep. 680; *Yarborough v. Bank of England*, 16 East, 6; *Baptist Church v. Railroad*, 5 Barb. 80; Angell & Ames on Corp., §§ 311, 384; 2 Hillard on Torts, 285, 286; Morse on Banks, 69 *et seq.* A corporation is liable for the acts of its servants, in the same manner and to the same extent that a natural person would be under like circumstances.

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WHEELER, J. Although the plaintiff has in this action declared as for a tort, still, so far as the tort rests upon contract, the same rules are to govern that would if the contract itself had been declared upon; as was said concerning actions of tort founded on the contracts of infants, in *Towne v. Wiley*, 23 Vt. 355, and was held respecting the tort of a married woman resting on her contract, in *Woodward v. Barnes*, 46 Vt. 382. The assumption of the obligation that the law imposes upon a depositary to keep the deposit is, of itself, a contract, as is apparent from the nature of the transaction and from authority. Jones on Bailm., § 50. In this case there is no evidence of any actual conversion of the plaintiff's bonds to the use of the defendant bank. And in the evidence of some constructive conversion, which the demand and refusal might otherwise afford, what was said in connection with making the refusal is to be taken as a part of it, and altogether that does not show any refusal in denial of the plaintiff's right, but rather a want of power to deliver, and an excuse for it, which would be very doubtful if not insufficient evidence of a conversion if the demand had been made of the party who had become the depositary. 2 Greenl. Ev., § 644. And would be none whatever of a conversion by the bank, in this case, unless it had itself become the depositary. The transactions by which the plaintiff claims that the bank had become the depositary were wholly with the cashier, and their effect to charge the bank rests entirely upon his power in that direction. There is no controversy, and could not properly be any, but that if the taking of these bonds to keep, as they were taken by the cashier, was within the scope of the corporative business of the bank, then the bank did become the depositary of them, subject to the liabilities of that relation, and, if without, not. A bank is an institution for the custody, loaning, exchange, or issue of money, and for facilitating the transmission of funds by drafts or bills of exchange. Webster's Dict., Burrill's Law Dict., Bouvier's Law Dict., tit. Banks. In *Foster v. Essex Bank*, 17 Mass. 497, the bank was chartered by that name, with power to contract by it, and without other express powers, leaving the scope of its corporate business almost wholly to implication; but, according to the special verdict in the case, it had always been its practice to receive special deposits of money and other valuable things, with the knowledge of and without objection by its directors. An important question in the case, which was debated by as able counsel as any in the country, was as to the power of the president and cashier to bind the bank by taking a large amount of gold coin in kegs to keep, on the taking of which a memorandum of its weight and amount was made, to which the president appended a statement signed by him, but not by his official title, that the coin was weighed in his presence, and the

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cashier a statement signed by him as cashier, that it was left at the bank for safe-keeping. After much deliberation it was decided that, on account of that practice, and not because it was a part of legitimate banking business, the bank became charged with the liabilities of a depositary of the coin. That case is much relied upon for the plaintiff in this case, and no other case, as to the scope of the powers of banks of sufficient importance to attract the attention of counsel, appears to have arisen and been decided between that and the passage of the act of Congress in 1864, under which this bank was organized. In authorizing the formation of banks under that act, the framers of it must have had in view what the objects of banks were defined to be, what their powers were understood to be. And with those things in view, after providing how the banks might be organized and officered, make contracts, sue and defend, they enacted that the banks might exercise, under that act, "all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt ; by receiving deposits ; by buying and selling exchange, coin, and bullion ; by loaning money on personal security ; by obtaining, issuing, and circulating notes according to the provisions of this act." Deposits in banks had then long been well understood to mean the placing of money in banks to the credit of the depositors, to be used by the banks as their own, and be drawn against by, or paid to, the depositors at their pleasure, and not the delivery of either money, securities, or other property, to be specifically kept and redelivered. These latter had been equally well known as special deposits. Story on Bailm., § 88 ; *Foster v. Essex Bank*, 17 Mass. 497. The receiving of such special deposits is not in any sense necessary to carrying on the business of banking. If made of money, even, no use could be made of it whatever ; nor could any profit be derived from it, unless charge should be made for the custody ; and then that business would be more like that of a warehouseman than that of a banker. The receiving of such general deposits is a part of ordinary banking business, and power to receive them is necessary to carrying on that part, and useful to carrying on others ; and when Congress granted to the banks the incidental powers necessary to carry on the business of banking by receiving deposits, the kind of deposits that the settled meaning of the term, used in such connection, would apply to, and the kind that would answer the description as to being necessary, must have been intended. The express grant of the powers mentioned is, on familiar principles, an implied exclusion of all not mentioned. It has been urged with plausibility for the plaintiff, that the mention of special deposits in section 46 of the act, shows that such were meant to be in-

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cluded among those that the banks, by section 8, are authorized to receive. But the provisions of section 46 are made solely with reference to winding up the affairs of banks after their business has been stopped, and not at all with reference to the prosecution of it; and this part of the section has especial reference to restricting, and not any to enlarging their powers. And then banks that would have deposits as security for loans might have their business stopped; and, if so, under the provision that they should not prosecute business except to receive and keep their money, they might be embarrassed about such special deposits, on payment of the debts, without such a provision as that in section 46 authorizing the delivery of them. But, whatever else may have been the purpose of inserting that clause there, it seems plain that it was not intended to add to powers that had been so categorically set forth in another separate section as to indicate that all were intended to be named there. This act of Congress, besides authorizing the formation of banks, provided a mode for organizing them by the shareholders signing a certificate stating the name, place, and amount of stock of the bank, the number of shares to each stockholder, and a declaration that the certificate was made to enable them to avail themselves of the advantages of that act. In the absence of any showing, it is presumed from the concession that this is a national bank organized under that act, that it was organized in that mode. And in organizing in that way, the shareholders would have a right to and would understand that they were engaging in no business except that which the act authorized; and that their officers, chosen by them under the act, would have no authority to enter into any business other than that, to bind them; and to allow the officers to jeopardize their interests by engaging in other business to the advantage of other persons, would allow the officers to perpetrate a fraud on the shareholders for the benefit of others.

It is insisted for the plaintiff, that the cashier, by taking the bonds and delivering the written certificate that they were deposited in the bank for safe-keeping, bound the bank to keep them safely, and that it has thereby become responsible for them. But, although Lord COKE in his report of *Southcote's* case, 4 Rep. 83, and in his commentary on Littleton, 1 Inst. 89 a, b, considered that a bailment to keep merely, and one to keep safely, were of the same obligation; other reports of that case do not seem to warrant his conclusion from it. *Southcote v. Bennett*, Cro. Eliz. 815. And it appears to be now well settled, that there is a substantial difference between the two undertakings. *Coggs v. Bernard*, 2 Ld. Raym. 911; Jones on Bailm. 48; Story on Bailm., § 72. In *Foster v Essex Bank*, it was expressly decided that neither the cashier

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nor the president of that bank, even when it had followed the practice of taking special deposits, could bind it by an express promise to keep the coin deposited safely, because such a promise would be outside the practice of taking to keep merely. And clearly on the authority of that case, the cashier in this case could not bind this bank by an express promise to keep the plaintiff's bonds safely. And the undertaking to keep, implied from the mere acceptance of a deposit, is as far outside the authorized business of this bank, as that express undertaking was outside the practice of that one. This case does not show that the cashier placed these bonds in the vault, or with the property of the bank at all; but doubtless the plaintiff expected he would and he did put them into the vault of the bank. But if he did, he did not do it as the agent of the shareholders of the bank in their corporate capacity, for he had not been made agent for such a purpose. If he had himself become the depositary, and put them there because he considered that to be a safe place for him to keep them in, then the bank is no more liable for them than it would be for bonds of his own if he should put them there for the same reason. If he was the plaintiff's agent in putting them there, they were there at the plaintiff's risk, as much as they would have been if the plaintiff had himself, with leave of the person in charge, placed them there. In neither case would the bank be any more liable than a merchant would be if the plaintiff should get his clerk to lock bonds of the plaintiff in his safe; or than a town would be if he should get the town clerk to lock his bonds into the safe used to keep the town records in. The cashier had no authority to bind the bank by any contract for the custody of the bonds, and the mere fact, if it was the fact, that they got into the vault of the bank, would not charge the bank with their custody. National banks have uses for government bonds, and might in various ways, probably, convert them to their use, and should they do so, they would unquestionably be liable for the tort, as natural or other artificial persons would; but as this case now stands, no such cause of action appears.

Foster v. Essex Bank is the only one of the cases cited in argument, or that has been observed, that has involved any question enough like the leading one in this case, to afford any direct guide for its decision; and there is this difference between that case and this, that in that case the charter did not proceed to express what powers the bank should have to make contracts and to do business, while in this, the act under which this bank is organized does expressly set forth what powers the bank should have, and does not include power to take special deposits among them. This case would have been like that as to powers of the

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banks, if the act of Congress, after authorizing the formation of banks with powers to contract, sue, and be sued, had stopped there, without setting forth any thing about the business as to which they might contract. As it is, the case has had to be decided more upon the construction of the act of Congress, considered with reference to settled principles that stand about the subject, than upon decided cases. And upon that act, so considered, it is determined here that the taking such special deposits to keep, merely for the accommodation of the depositor, is not within the authorized business of such banks, and that their cashiers have no power to bind them to any liability on any express contract accompanying, or any implied contract arising out of, such taking. And this conclusion cannot work any injustice or hardship to the plaintiff, for he dealt with the cashier because he chose to, not because he was obliged to; and if the cashier in the dealings assumed to have any power he did not have, the plaintiff trusted him in that respect, and has his responsibility to rely upon to vindicate the assumption. And if the cashier incurred any liability as for himself, the plaintiff likewise trusted him about that, and has the same responsibility of the cashier to look to for it.

Judgment reversed, and cause remanded.

GRIMES V. GATES.

(47 Vt. 594.)

Threats — declaration — what threats actionable.

Declaration that defendant did wrongfully threaten plaintiff with great injury. *Held* too general.

Declaration that defendant did threaten to have "plaintiff arrested and imprisoned in the State prison." *Held* sufficient on demurrer.

ACTION on the case. The declaration contained five counts. The first count alleged that the defendants, with intent to injure, frighten and terrify the plaintiff, without any reasonable or probable cause whatever, "did wrongfully and maliciously write, compose, and send to the plaintiff, a letter containing wicked, scandalous, and threatening matter, therein using wicked and scandalizing language concerning the plaintiff, and did therein use threatening language to the plaintiff, and did threaten her with great

injury ;” and averred that the plaintiff received said letter, and that by means of the premises, she was greatly frightened, terrified, and injured, and thereby suffered great loss ; that at the time she received the same she was with child, and that by reason of the wicked, scandalous, and threatening matter therein contained, she was made sick for a long time, and confined to her bed, and put to great expense, and rendered unable to attend to her usual business and perform her usual work. The second count alleged that the defendants, with like intent, “ did wrongfully and maliciously write, compose, and send to the plaintiff a certain other letter, containing other wicked, scandalous, and threatening matter, therein using other wicked and scandalizing language concerning the plaintiff, and did therein threaten to have the plaintiff arrested and imprisoned in the State prison, and to accuse the plaintiff of crimes punishable by imprisonment, and did threaten her with great injury ;” with the same averment contained in the first count. The third and fourth counts were substantially like the second. The fifth count alleged that the defendants, with like intent, “ did wrongfully write, compose, and send to one Joseph K. Grimes, a letter containing wicked, threatening, and menacing matter concerning the plaintiff, therein threatening and menacing the plaintiff with great injuries, and that they, the defendants, would accuse the plaintiff of the crime of adultery, and that they, the defendants, would have the plaintiff arrested, and imprisoned in the State prison, and that they, the defendants, would take measures, by accusing the plaintiff of crime, to have the plaintiff imprisoned in the State prison, and did, in said last-mentioned letter, request the said Grimes to read the same to the plaintiff ;” with an averment that said Grimes did read the same to the plaintiff, and with other averments as in the other counts. General demurrer to the declaration, and joinder.

The court, at the December term, 1872, BARRETT, J., presiding, sustained the demurrer, *pro forma*, and adjudged the declaration insufficient ; and rendered judgment for the defendants ; to which the plaintiff excepted.

J. N. Edminster, for plaintiff.

J. Converse, for defendant.

WHEELER, J. Threats of bodily hurt which occasion such interruption or inconvenience as is a pecuniary damage, are actionable. Not the threats alone, but the threats and consequent damage together. 3 Bl. Com. 120 ; 2 Com. Dig., Battery, D. ; Jacob’s Law Dic., tit. Threats, Bouv. Law Dic., tit. Menace ; 1 Swift’s Dig. 477. The extortion of

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money or property by means of such threats is, at common law, indictable. *The Queen v. Woodward*, 11 Mod. 137; 6 East, 133, note; 3 Chit. Crim. Law, 607. The threats make the cause of action, by producing fear which causes damage; and the crime, by producing fear which compels the giving over of money or property. A mere vain fear is not sufficient. It must be founded upon an adequate threat. Co. Litt. 253 b; *The King v. Southerton*, 6 East, 126; *Taft v. Taft et ux.*, 40 Vt. 229. A threat of imprisonment is a threat of bodily hurt, and would seem to be sufficient. Co. Litt. 253 b; *The King v. Southerton*, *supra*. In declaring for such an injury, the pleader must "shew some just cause of feare, for feare of itself is internall and secret." Co. Litt. 253 b. In indictments for such threats, it is not necessary to set forth the words in which the threats were made, but only the substance of the threat. 3 Chit. Crim. Law, 607. No reason for any greater particularity in civil cases is apparent. In actions for slander, the injury is occasioned wholly by words, and the words must be set forth, so as to show that they were such as would occasion an actionable injury, or no cause of action would be set forth. So in indictments on statutes for sending threatening letters of certain kinds, the letters must be set out, so that they may appear to be such as the statutes were directed against. 2 East's P. C. 1122. The gist of this action is not the use of words to the injury of reputation, nor the writing of any thing prohibited by a particular statute, but is the threatening so as to cause pecuniary damage. It would seem to be sufficient, as to this, to set forth in substance the making of such a threat as would be adequate to the result. The only threat alleged in the first count is, that the defendants did threaten the plaintiff with great injury. This may have meant an injury to property, and not to person, and something remote and fanciful, and not any thing direct and tangible. Such allegations are to be taken most strongly against the pleader. Such threats would not be sufficient to awe persons of ordinary firmness. And the count does not set forth that the defendants knew of any reason why the plaintiff could not withstand as much and as severe threatening as ordinary persons. If there was such a reason that the defendant knew of, and took advantage of, and thereby, and by making the threat alleged, they injured the plaintiff, and all these facts were alleged, the count would, probably, be sufficient. But such facts not being alleged, cannot be presumed to exist. There seems to be a lack of any threat sufficient of itself, and of any threat made sufficient by accompanying circumstances, alleged in this count, to make it sufficient. *Taft v. Taft et ux.*, *supra*. In each of the other counts, a threat to imprison the plaintiff, or to cause her to be imprisoned, is distinctly alleged. In each one of all the counts

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it is alleged that the defendants made the threats intending to frighten, terrify, and injure the plaintiff, and that by means of the threats she was terrified, frightened, and made sick, and rendered unable to attend to her usual business and perform her usual work, and was thereby put to expense and made to suffer loss. These are sufficient allegations of pecuniary damage. *Underhill v. Welton*, 32 Vt. 40. All the counts, except the first, seem to set forth sufficient facts when admitted by demurrer or found by a jury, to constitute good ground of recovery.

The *pro forma* judgment that the declaration was insufficient is reversed as to all the counts but the first, and the cause is remanded, with leave to the parties to move for amendment or repleader, in the County Court.

PROSSER V. WARNER.

(47 Vt. 667.)

Foreign judgment — ex parte judgment for alimony — divorce.

Parties were married in New York and afterward removed to Vermont where the husband left the wife. Thereupon she returned to New York and there obtained a decree for divorce and alimony for the husband's adultery in Vermont after notice by publication and by mailing a copy of the summons and complaint to the town in Vermont where he had last lived with his wife, but from which he had afterward removed. The husband did not appear in the suit. *Held*, in an action of debt on the decree for alimony, that the decree was not binding on the defendant in Vermont. *Semble* — that the decree of divorce was not.

ACTION of debt on a decree for alimony. The opinion states the case. Judgment was rendered for the defendant, to which plaintiff excepted.

W. C. French, for plaintiffs.

S. E. & M. Pingree, for defendant.

Ross, J. In this case the plaintiffs seek to recover the amount of a decree of alimony granted to the plaintiff's wife by the Supreme Court of New York, in June, 1868, in proceedings commenced by her to obtain a divorce from the defendant. The action is debt upon that judgment. The defendant having obtained oyer of the record of the proceedings in the Supreme Court of New York, and spread them upon the record in

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this case, by his plea insists that the same are insufficient in law to enable the plaintiffs to maintain their action. From the record of the proceedings in the Supreme Court of New York, it appears that the plaintiff, Sarah, was married in 1831, to the defendant, at Gorham, in the State of New York, and continued to live with him in that relation till November, 1863, when he left her. At the latter date, and for at least some six months prior thereto, they resided in Shelburne, in this State. The alleged cause for the divorce is the adultery of the defendant, committed within this State while they were residing in Shelburne, and subsequently thereto. In the same petition for divorce, the defendant is set up as having had his last known residence in Shelburne, and as then residing in parts unknown. Notice of the pendency of the divorce was given by publication, and by mailing a copy addressed to him at Shelburne. The defendant did not appear, and from the testimony in that suit, it appears that he was then residing in this State, but not at Shelburne. From these facts, it is apparent that the Supreme Court of New York neither had nor obtained jurisdiction of the person of the defendant. Unless a decree for alimony in a divorce suit stands upon a different basis, and is to be controlled by different principles, than an ordinary judgment for recovery of money, the defendant is not bound by the judgment rendered against him by the Supreme Court of New York. In order to give such validity to an ordinary judgment for the recovery of money as will render it enforceable in another jurisdiction, the court rendering the judgment must have not only jurisdiction of the subject-matter, but of the person of the defendant. Where the court has jurisdiction of the subject-matter, but not of the person of the defendant, its judgment may be enforceable and binding upon the defendant to the extent of his property taken in the suit or on the judgment, and which is located within the territorial jurisdiction of the court rendering the judgment. Such a judgment is not enforceable against the person of the defendant, and is not a judgment *inter partes*, but rather a judgment *in rem*, affecting the property of the defendant within the territorial jurisdiction of the court. It is only enforceable against the defendant within the State or government in which the judgment was rendered. The publication of notice to the defendant, or the service of process upon him beyond the territorial limits of the State or government in which the court has jurisdiction, is ineffectual to confer jurisdiction over the person of the defendant. The effect of notice by publication, or of service of process beyond the territorial jurisdiction of the court rendering the judgment, as well as of a judgment for the recovery of money by a court which has not jurisdiction of the person of the defendant, has been fully considered by this court,

in the recent case of *Price v. Hickok*, 39 Vt. 292, and need not be further stated here. The principles enunciated in that case render it apparent that the decree by the Supreme Court of New York affords the plaintiffs no ground for recovery in this action, unless a decree granting alimony in a divorce case stands on a different basis, and is to be governed by different principles, from an ordinary judgment for the recovery of money. No reason has been brought to our attention in the argument, for holding that a decree in a divorce suit, ordering the payment of money as alimony, has any greater validity or binding force than any ordinary judgment requiring satisfaction by the payment of money. The ordering of the payment of money as alimony, and the granting of alimony in any form, is but an incident to the granting of the divorce. Ordinarily, unless the divorce is granted, the court has no power or jurisdiction to grant permanent alimony. In rendering judgment against a defendant over whose person the court has not acquired jurisdiction, the court has usually jurisdiction of the subject-matter or contract which is the foundation of the judgment. It is doubtful if the Supreme Court of New York had jurisdiction of the causes of divorce which occurred within this State and while the defendant was residing here. It seems to be the better opinion among jurists, that, as a principle of general law, jurisdiction over causes of divorce depends, primarily at least, upon the domicile of the parties at the time the alleged cause occurred. The act need not necessarily have occurred within the local jurisdiction. If it occur elsewhere, while the parties, or one of them, are temporarily abroad, it will be referred, generally, to the place of their fixed domicile, and will have the same effect there as if committed within that jurisdiction. What violations of the marriage relation shall amount to causes for divorce are established and declared by statute. Each legislative jurisdiction has its own independent causes, which are determined and administered by the courts of that jurisdiction. We are not aware that any State ever attempted to try a cause for divorce according to the laws of another State, or to render such a judgment as a foreign court should have rendered upon the same facts. The jurisdiction to try causes of divorce is confessedly local. They are tried by the law of the forum where tried; and the facts must constitute a good cause of divorce by the law of the forum, or no decree can be rendered.

The regulation of the marriage relation, and of the acts or neglects that may amount to a good cause for sundering that relation, is a matter of internal police, important to, and affecting, not only the parties to that relation, but the well-being of the State. It would seem it should be administered wholly by the courts of the State where the declared viola-

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tions of the marriage relation occur, or where the parties are domiciled at the time. The acts relied upon for the cause of divorce must have accrued while the parties were subject to the law of the forum where the divorce is granted. Otherwise the courts in one jurisdiction might determine and administer the marriage relation between citizens domiciled in another jurisdiction. This would allow one jurisdiction to pass laws, in the language of Lord ELLENBOROUGH in *Buchanan v. Rucker*, 9 East, 192, "to bind the rights of the whole world," — a proposition too absurd to require refutation. In much the larger number of adjudged cases, and as we think of the better considered cases, it has been held that the judgment rendered in a suit for divorce, in a State where the cause of action did not accrue, and where the parties were not then living as husband and wife, and where the defendant in the proceeding never was served with process, nor voluntarily submitted to the jurisdiction of the court, is wholly void in any other jurisdiction than the one in which it was rendered. *Barber v. Root*, 10 Mass. 260; *Hanover v. Turner*, 14 id. 227; *Lyon v. Lyon*, 2 Gray, 369; *Dorsey v. Dorsey*, 7 Watts, 349; *Maguire v. Maguire*, 7 Dana, 181; *Hull v. Hull*, 2 Strobb. Eq. 174; *Edwards v. Green*, 9 La. Ann. 317; *Irby v. Wilson*, 1 Dev. & Batt. Eq. 568, 576; *Borden v. Fitch*, 15 Johns. 121; *Bradshaw v. Heath*, 13 Wend. 407; *Vischer v. Vischer*, 12 Barb. 640; *Mc Giffert v. Mc Giffert*, 31 id. 69.

The courts of New York have gone quite as far as those of any State, in holding such judgments void. In the case of *Fitch v. Borden*, it was held, that such a judgment rendered by the Supreme Court of this State was wholly void, and was not admissible in evidence for the defendant in a suit to recover damages from him for debauching the plaintiff's daughter, to whom he had been legally married, if the judgment rendered by the Supreme Court of this State, divorcing him from a former wife, was residing in Connecticut, and who was not served with process in this State, and did not appear in the suit, and whom he left in Connecticut when he came to this State to reside, was valid. The contrary doctrine has been maintained in *Harding v. Alden*, 9 Greenl. 140; *Ditson v. Ditson*, 4 R. I. 89, and *Tolen v. Tolen*, 2 Blackf. (Ind.) 407. In *Ditson v. Ditson*, the validity of *ex parte* divorces in foreign States is attempted to be upheld, on the principle that jurisdiction of the *cause* is acquired by the domicile of one of the parties, notwithstanding the cause accrued without the State, upon the ground that it pertains to all sovereign States to declare conclusively the *status* of their own citizens. But the soundness of these decisions is strongly questioned, both upon principle and authority, by the late Chief Justice REDFIELD, in an article in 3 Am. Law Register (N. S.), 193, in which he thoroughly reviews the whole subject. He admits

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that such judgments may be a protection to the parties obtaining them, in the jurisdictions where they are obtained, but denies that they have any validity in foreign jurisdictions. Such, we think, is the better doctrine. Otherwise, in determining the *status* of its own citizens, such sovereign State, necessarily, conclusively determines the *status* of the citizen of another sovereign State, whenever the other party to the marriage relation is domiciled in a foreign jurisdiction. Such doctrine involves an unavoidable conflict in the jurisdiction over its own citizens, as such sovereign State must concede to other sovereign States the same right in regard to its own citizens, which it claims to exercise over the citizens of such other sovereign States.

Whatever may be the validity of such *ex parte* judgments upon the marriage relation of the parties named in the judgment, we have found no case which holds that the decree for the payment of money as alimony stands any differently than any other *ex parte* judgment calling for satisfaction by the payment of money. We are unable to see any principle which distinguishes the validity of the former from that of the latter.

Judgment affirmed.

SARGENT V. SLACK.

(47 Vt. 674.)

Bailment — agistment — neglect of agister — recoupment of damage.

Plaintiff, having agreed to pasture defendant's sheep, turned them into a field separated from a field of S. by an insufficient fence, part of which it was plaintiff's duty to maintain. The sheep escaped into S.'s field where they became diseased from contact with other sheep. *Held*, in an action of account for the agistment, that plaintiff was guilty of negligence in suffering the sheep to escape, and that defendant could recoup the damage. (See note, p. 139.)

ACTION of account to recover \$35 for pasturing defendant's sheep and for care and attendance. Defense, that the sheep had, by plaintiff's negligence, passed from plaintiff's field through a defective fence into the field of one Simons, and had there contracted the scab by mingling with diseased sheep, to defendant's damage, which he sought to recoup.

The auditor found the facts as stated and also that the fence between plaintiff's pasture and the field of Simons was not such as the law required, but insufficient, and that it was plaintiff's duty to maintain a part of it and Simons' duty to maintain the other part; that it did not appear

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whether or not plaintiff knew that Simons' sheep were infected with the disease, nor over whose part of the fence the sheep had escaped.

Judgment was rendered on the report for the plaintiff and defendant excepted.

S. E. & S. M. Pingree, for defendant, cited *Jones on Bailm.* 128, 133; 1 *Rol. Abr.* 4; 1 *Bl. Com.* 451, n.; *Calye's case*, 8 *Co.* 32, a; *Broadwater v. Blot*, 1 *Holt*, 547.

Charles P. Marsh, for plaintiff, cited *Edw. on Bailm.* 45; *Gen. Stats.*, ch. 104, § 7; *Hall v. Adams*, 1 *Aik.* 166; *Town v. Lamphire*, 36 *Vt.* 101; *Phelps v. Paris*, 39 *Vt.* 511.

Ross, J. The plaintiff was the bailee of the defendant's sheep for hire. The bailment was for the mutual advantage of both parties. The plaintiff was bound to bring to the performance of the contract of bailment in pasturing the defendant's sheep, the exercise of ordinary care, or that degree of care which a man of ordinary prudence would use in the performance of the same duty toward his own property. *Phelps v. Paris*, 39 *Vt.* 511; *Broadwater v. Blot*, 1 *Holt*, 547. This degree of care the plaintiff was to exercise in the maintenance of proper fences and bars, to restrain the sheep from wandering or straying from his pasture. If the sheep had been lost by reason of the plaintiff's neglect to maintain a proper fence around his pasture, he would have been liable to the defendant for such loss. In *Broadwater v. Blot*, 1 *Holt*, 547, the defendant was a farmer and had received the plaintiff's horse to agist at a stated price. The horse strayed from defendant's field, and was lost. The plaintiff gave some evidence of the bad condition of the fences on the defendant's farm, and likewise of general negligence in leaving open the gates of his fields. The defendant's own horses strayed at the same time, but were recovered. GIBBS, Ch. J., in submitting the case to the jury, used the following language: "The question is, were the defendant's fences in an improper state at the time the horse was taken in to agist? Did he apply such a degree of care and diligence to the custody of the horse, as the plaintiff, who intrusted the horse to him, had a right to expect?" The plaintiff had a verdict for the value of the horse. The contract of agistment imposes the duty on the agister of restraining the animals agisted, by lawful fences, within his own inclosure, unless there is some special understanding between the parties which relieves him from this duty in whole or in part. If the animals agisted escape or stray from the inclosure for the want of such fences, and are lost or

suffer damages thereby, the agister is liable for such loss or damage. If the defendant's sheep had been run down and killed by a vicious horse, on some of the occasions when they escaped from the plaintiff's inclosure into Simons' pasture through the insufficiency of the plaintiff's fence, would there be any doubt in regard to the plaintiff's liability for their loss? We think not. Nor would the fact that he did not know that there was a vicious horse in Simons' pasture, relieve him from liability. He negligently allowed them to stray into an inclosure over the occupancy of which he had, and could exercise, no control. It was the essence of the contract of agistment, that he should keep the sheep in an inclosure, over the occupancy of which he had control, and in regard to the occupants of which he could exercise care and diligence, that they might not be of that character which would necessarily, or be likely to be, injurious to the safety of the defendant's sheep. The plaintiff, through negligence in maintaining the division fence, allowed the defendant's sheep to stray into Simons' pasture, and there become infected with the scab from other sheep over which he could exercise no control. He thereby exposed the defendant's sheep to dangers which he could not guard against or control, and broke the implied contract of agistment to exercise reasonable care and diligence to keep the defendant's sheep within his control and safe from injury. The plaintiff is not excused by the failure of Simons to properly maintain his portion of the division fence. The statute has pointed out a method by which the plaintiff could compel the maintenance of a lawful fence by Simons on the division line, so that defendant's sheep could not have strayed into Simons' pasture nor could Sargent's sheep have strayed into the plaintiff's pasture. We think it must be held that the plaintiff, in not maintaining a lawful fence on his portion of the division line, and in not compelling the maintenance of a like fence on Simons' portion of that line, failed to discharge the duty to the defendant which the contract of agistment cast upon him, and was guilty of a negligence by which the defendant's sheep became diseased, and were lessened in value more than the amount of the contract price which the defendant was to pay for pasturing the sheep. The damages sustained by the defendant from this neglect are unliquidated and not properly chargeable in an action on book account. The defendant can only avail himself of them in this action in reduction of the plaintiff's charge for keeping the sheep, and to the extent of that charge. The auditor has found that the two sheep unaccounted for were not lost through any fault or neglect of the plaintiff. This is conclusive against the defendant's right to have the value of these sheep deducted from the other items allowed to the plaintiff. The items allowed to the plaintiff,

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excluding the charge for pasturing the sheep, amount, with interest computed to the present time, to \$9.19.

The tender made on behalf of the defendant cannot avail to defeat the plaintiff's recovery of this sum. To have given it that effect, he should have availed himself of it before the auditor, by passing it into the auditor's hands, and by having it returned with the auditor's report into court, so that the plaintiff could have taken the same in satisfaction of the amount found due him by the auditor. To keep a tender good, the party making it must avail himself of it, and bring the money into court as soon as he is called upon to plead, which, in book actions, is at the trial before the auditor. If the action is commenced before a justice of the peace, as it would seem this case must have been commenced, although the exceptions do not show it, a failure to produce the tender in court on the trial before the justice is a waiver of it. *Chipman v. Bates*, 5 Vt. 143. The defendant waived the tender by failing to produce it at the trial before the auditor, and to have it returned into court with the auditor's report. *Woodcock v. Clark*, 18 Vt. 333. The result is, that the judgment of the County Court is reversed, and judgment is rendered on the report for the plaintiff to recover \$9.19 and his costs, and as the amount recovered is less than \$10, that the trustee is discharged with costs.

NOTE.—In *Smith v. Cook*, L. R., 1 Q. B. D., 79, the defendant, an agister of cattle, placed the plaintiff's horse in a field with a number of heifers, knowing that a bull, kept on adjoining land, had several times been found in the field, and that there was no sufficient fence to keep it out. He did not, however, know that the bull was of a mischievous disposition. The horse was gored by the bull and killed, and in an action against the defendant for breach of contract to take reasonable care, the jury found for the plaintiff,—*Held*, that the fact that defendant had no knowledge of the mischievous disposition of the particular bull, was no ground for disturbing the verdict, as such knowledge was not essential to his liability under his contract as an agister, to take reasonable care of the plaintiff's horse.—REP.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

PHELPS v. RACEY, appellant.

(60 N. Y. 10.)

Constitutional law — game laws — depriving of property without due process of law — regulation of commerce between the States.

A statute imposed a penalty on any person who should have in his possession any dead game at a certain season. In an action for the penalty defendant answered that some of the dead game was in his possession before the passage of the statute and when the killing was not prohibited, and that the remainder was received from another State where the killing was lawful. *Held*, that a demurrer to the answer was properly sustained. The act was within the power of the legislature and was in violation neither of the constitution of the United States as being a regulation of commerce, nor of the State constitution as being a deprivation of property without due process of law.

ACTION to recover penalties imposed by the Laws of 1871, ch. 721, for the preservation of game.

The complaint contained three counts: 1st, that the defendant had in his possession on the 15th of March, 1873, and exposed for sale, six quail; 2d, that on the 19th of March he had in his possession and exposed for sale, two pinnated grouse; and 3d, that on the same day he had in his possession 100 quail.

The answer admitted the allegations of the complaint, but alleged that defendant had invented an apparatus to preserve game, and that the game specified in complaint was put up by him in said apparatus, in the month of December, 1872, when the killing of it in this State was not prohibited, or it was received from the States of Minnesota and Illinois where the killing was at the time legal.

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Plaintiff demurred that the answer did not state facts sufficient to constitute a defense.

The Special Term sustained the demurrer so far as the answer related to the first two counts of the complaint and directed judgment for the plaintiff thereon, and overruled the demurrer so far as the answer related to the third count. Both parties appealed. The General Term affirmed that portion of the order appealed from which sustained the demurrer, but reversed it so far as it overruled the demurrer.

John Proffatt, for appellant. The regulation of interstate as well as foreign commerce belongs exclusively to Congress by art. 1, § 8, of the Constitution. *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Maryland*, 12 id. 419; *N. R. Steam Co. v. Livingston*, 3 Cow. 713; *Almy v. California*, 24 How. 169; *State Freight Tax*, 15 Wall. 271. A State may not pass laws regulating internal commerce extending to or affecting other States. *Gibbons v. Ogden*, 9 Wheat. 1; Story on Const., § 1061; *Steamer Daniel Ball*, 10 Wall. 557; 15 id. 277; *Fitch v. Livingstone*, 4 Sandf. 492. The police power exercised by a State, being in derogation of the general power granted, is to be strictly defined and limited. Story on Const., § 1066; *N. R. Stbt. Co. v. Livingston*, 3 Cow. 733; 15 Wall. 279; *License cases*, 5 How. 504; *Cooley v. Bd. of Wardens*, 12 id. 311; *Gilman v. Philadelphia*, 3 Wall. 713; *Slaughter-house cases*, 16 id. 36; *Bartemeyer v. Iowa*, 18 id. 129; *S. S. Co. v. Pt. Wardens*, 6 id. 31. The act in question is unconstitutional and void. *Woodruff v. Parham*, 8 Wall. 140; 3 Cow. 732; *Corfield v. Coryell*, 4 Wash. 379; Story on Const., § 1061.

Charles E. Whitehead, for respondent. Ch. 721, Laws of 1871, is constitutional. *Wilson v. B. C. M. Co.*, 2 Pet. 251; *Gilman v. Philadelphia*, 8 Wall. 713, 730; *Cooley v. Bd. of Wardens*, 12 How. 299, 318; *Ex parte McNeil*, 13 Wall. 236; *Peirce v. New Hampshire*, 5 How. 577, 584; *Sturges v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 id. 213; *New York v. Milne*, 11 Pet. 144; *Brown v. Maryland*, 12 Wheat. 446; *Gibbons v. Ogden*, 9 id. 195; *Pennsylvania v. W. and B. B. Co.*, 18 How. 421, 430.

CHURCH, Ch. J. We concur with the conclusion arrived at by the General Term. With the policy of the statute in question we have no concern, but that the acts complained of, viz., having in possession certain game birds after the first of March, although killed prior to the prohibited time, or brought from another State where the killing was not pro

hibited, is within the restraint of the statute, there can be no doubt. The seventh section declares that no person shall kill or expose for sale, or have in his or her possession after the same has been killed, any quail, between the first day of January and twentieth of October under the penalty of twenty-five dollars. Laws of 1871, p. 1669. The eighth section contains a similar provision relative to ruffed grouse or partridge, and pinnated grouse or prairie chickens, fixing the time between the first day of January and first day of September. The language of these sections is plain and unambiguous. Hence there is no room for construction. It is a familiar rule that when the language is clear, courts have no discretion but to adopt the meaning which it imports. The mandate is that "any person having in his or her possession," between certain dates, certain specified game killed, shall be liable to a penalty. The time when or the place where the game was killed, or when brought within the State, or where from, is not made material by the statute, and we have no power to make it so. But if the intent in this respect was doubtful, section 33 would remove it. That section provides that persons selling, or in possession of game, shall not be liable to the penalty up to the first day of March, provided they prove that it was killed before the prohibited time, or outside of the limits of the State where the killing was not prohibited. Provision is made by this section for the cases supposed not to be within the purview of the seventh or eighth section, but it is clear that the legislature did not so suppose, but intended to qualify those sections by allowing possession to continue, and a sale of game lawfully killed or acquired for two months, but after that period the inhibition is absolute.

It is admitted in this case that the defendant had possession of the game after the first of March, and the fact alleged, that it was either killed within the lawful period or brought from another State where the killing was lawful, constitutes no defense. The penalty is denounced against the selling or possession after that time, irrespective of the time or place of killing. The additional fact alleged, that the defendant had invented a process of keeping game from one lawful period to another, is not provided for in the act, and is immaterial.

The objection of a want of power in the legislature to pass the act is not tenable. It is not in conflict with the State constitution within the case of *Wynehamer v. People*, 13 N. Y. 378. That case involved the validity of the prohibitory liquor law, and determined that such law, so far as it applied to and substantially destroyed property in liquors owned or possessed at the time the act took effect, was in violation of that provision of the State constitution which declares that no person shall be de

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prived of life, liberty or property without due process of law, but impliedly, if not necessarily, it affirmed the power if the law had only applied to liquors subsequently manufactured and acquired. Here the property was acquired subsequent to the passage of the act and with the presumed knowledge of its provisions and conditions. The legislature may pass many laws, the effect of which may be to impair or even destroy the right of property. Private interest must yield to the public advantage. All legislative powers, not restrained by express or implied provisions of the constitution, may be exercised. The protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds, one of which is for purposes of food. The measures best adapted to this end are for the legislature to determine, and courts cannot review its discretion. If the regulations operate, in any respect, unjustly or oppressively, the proper remedy must be applied by that body. Some of the provisions of the act in question might seem, to one unversed in the mysteries of the subject, to be unnecessarily stringent and severe, but we cannot say that those involved in this action are foreign to the objects sought to be attained, or outside of the wide discretion vested in the legislature.

It is also urged that the statute in question violates that provision of the constitution of the United States which authorizes Congress to regulate commerce among the States. It is unnecessary to consider how far the exercise of the power of Congress under this provision would interfere with the authority of the States to pass game laws, and regulate and prohibit the sale and possession of game either as a sanitary measure or for its protection as an article of food. It will suffice for this case that the statute does not conflict with any law which Congress has passed on the subject. States cannot pass laws in respect to subjects expressly prohibited by the constitution, nor when the power is conferred upon Congress and its exercise by the States conflicts with the policy or functions of the government, but there are many powers conferred upon Congress which, until exercised by it, are regarded as dormant and may be exercised by the States within their limits, among which is the power to regulate commerce. "If the terms of the grant are not exclusive, and there is no express prohibition upon the States, and no repugnancy or inconsistency in its exercise by the States, the authority is concurrent." *People ex rel. Barlow v. Curtis*, 50 N. Y. 326. The celebrated license cases, reported in 5 How. (U. S.) 504, contain an elaborate examination of the powers of the States under this clause of the constitution. One of those cases involved the right of a State to require a license for the sale of a package of gin, imported from another State, as to which

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TANEY, Ch. J., said : " As Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue." And CATRON, J., after alluding to the exercise of power by the States, upon subjects involved in various affirmative grants to Congress, said : " It is now too late, under existing circumstances, for this court to say that the similar affirmative power to regulate commerce with foreign nations and among the States shall be held an exclusive power in Congress."

It is quite evident, within these principles which have been repeatedly reiterated by the Supreme Court of the United States, that the act in question does not violate the constitution of the United States, nor any law of Congress. 4 Wheat. 122 ; 12 id. 213 ; 12 How. (U. S.) 269 9 Wheat. 195 ; 16 Wall. 36 ; 15 id. 279 ; 6 id. 31.

The judgment of the General Term must be affirmed.

All concur.

Judgment affirmed.

CARROLL V. CARROLL.

(60 N. Y. 121.)

Evidence in action for dower — death of husband.

In an action for the admeasurement of dower the record of the probate of the will of the plaintiff's husband is not competent evidence of his death. (*See note, p. 148.*)

ACTION for the admeasurement of dower of certain lands claimed by the plaintiff as widow of John Carroll. Among the issues ordered tried by the jury was, " Is the said John Carroll dead? "

To prove the death of her husband plaintiff offered the record of the probate of his will by and before the surrogate of Kings county. This was objected to and received under objection. The court charged the jury, in substance, that this was *prima facie* evidence of the death of Carroll, and, being undisputed, was conclusive, and instructed them, therefore, to answer the question in the affirmative, to which defendant's counsel duly excepted. The jury answered in accordance with the instructions, and judgment was entered in favor of the plaintiff, which was affirmed by the General Term, and defendant appealed.

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Philip S. Crooke, for appellants. The probate proceedings before the surrogate were not evidence of Carroll's death. 2 R. S. 74, § 26; 2 Phil. Ev. 93; *Belden v. Meeker*, 47 N. Y. 307; 2 Greenl. Ev., §§ 278 a, 355; 1 id., § 550; 52 N. Y. 630; *Moons v. De Bernales*, 1 Russ. 301; *Sergeson v. Sealy*, 2 Atk. 412; 1 Saund. 362, note by Wms.; *Thompson v. Donaldson*, 1 Esp. 63; *Doe ex dem. Ash v. Calvert*, 2 Camp. 389; *Doe ex dem. Hall v. Penfold*, 8 C. & P. 536; *Munro v. Merchant*, 26 Barb. 384; *Russell v. Schuyler*, 22 Wend. 277; *Newman v. Jenkins*, 10 Pick. 515.

Nathaniel C. Moak, for respondent. In an action in which the legal representatives of a deceased party are adverse parties, a party may testify to a conversation overheard by him between the deceased and a third party. *Hilderbrand v. Crawford*, 6 Lans. 502; *Lobdell v. Lobdell*, 36 N. Y. 327; *Simmons v. Sisson*, 26 id. 277; *Card v. Card*, 39 id. 318. Carroll's will, with proofs, citations, were admissible in evidence as proof showing his death. *Cunningham v. Smith*, 70 Penn. St. 450; *Newman v. Jenkins*, 10 Pick. 515; *Jeffers v. Radcliff*, 10 N. H. 242, 245; *Thomson v. Donaldson*, 3 Esp. N. P. 63; 1 Phil. Ev. 246; 1 Salk. 290; 11 State Trials, 261; *Crippen v. Dexter*, 13 Gray, 332; 2 Taylor's Ev., 6th ed., § 1491, p. 1437; 2 R. S. 58, § 15; 2 Edm. St. 59; *Hill v. Crockford*, 24 N. Y. 128; *Morris v. Keyes*, 1 Hill, 540; *Nichols v. Romaine*, 3 Abb. 122; *Caw v. Robertson*, 5 N. Y. 132; *Thompson v. Thompson*, 9 Penn. St. 234; *Vanderpoel v. Van Valkenburgh*, 6 N. Y. 190; *Redmond v. Collins*, 4 Den. 430; *Patten v. Tallman*, 27 Me. 17; *Willards' R. E. and Con.* 549, 550; *In re Smith's Will*, Tuck. 108; Laws 1846, ch. 182; *Munro v. Merchant*, 26 Barb. 383, 384; *Russell v. Schuyler*, 22 Wend. 277; *French v. French*, 1 Dick. 268.

MILLER, J. Proof of the death of John Carroll, the testator, was absolutely essential to entitle the plaintiff, who claimed that she was his widow, to recover in this action. The only evidence of Carroll's death was the record of the probate of his last will and testament, made before the surrogate of the county of Kings. This was received after an objection made, and the judge charged the jury, that it was *prima facie* evidence of the death of Carroll, and, being undisputed and uncontradicted, was conclusive upon that question. The judge was in error in both of these decisions named and I think that the exception to the evidence and the charge were each well taken.

Letters testamentary and of administration are conclusive evidence of the authority of the persons to whom granted, and are sufficient to estab-

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lish the representative character of the plaintiff who assumes to sue by virtue thereof. 2 R. S. 80, § 56; *Belden v. Meeker*, 47 N. Y. 307; *Farley v. Mc Connell*, 52 id. 630. So also, a will proved with a certificate of the surrogate and attested by his seal of office may be read in evidence without further proof, and the record of the same and the exemplification of the same by the surrogate may be received in evidence the same as the original will would be if produced and proved. 2 R. S. 58, § 15.

The object of this provision was to make the certificate of the surrogate and the record of the will, or exemplification, *prima facie* evidence only. *Vanderpoel v. Van Valkenburgh*, 6 N. Y. 190, 199. In 2 Greenleaf's Evidence, § 339, it is said that: "The proof of the plaintiff's representative character is made by producing the probate of the will, or the letters of administration, which *prima facie* are sufficient evidence for the plaintiff of the death of the testator or intestate, and of *his own right to sue*." This is undoubtedly the true rule; and it will be found upon examination that the authorities cited upon this question relate mainly to cases where the right of the administrator or executor to sue is involved, or where the parties were connected with the proceeding, interested in the estate, and had their rights adjudicated upon when the will was established before the Probate Court. Such are the cases cited from other States, with scarcely any exception, and none of them can be regarded as sustaining the broad principle that the probate of a will of itself establishes the death of the testator in any other case. The general rule laid down in 1 Greenleaf's Evidence, § 550, as to the effect of the probate of a will, or the grant of letters of administration, is also liable to criticism, and is not, I think, sustained by the English cases which are cited to support it. It may then be considered as established by the cases relied on by the plaintiff's counsel that letters testamentary, and the proofs of a will before a surrogate, are only evidence in some proceeding arising out of the will itself, and the parties who claim under it or are connected with it, and they cannot upon their face affect, or in any way control, the interests of parties who are entirely disconnected with the proceedings before the surrogate and not within his jurisdiction. It follows, therefore, that in an action of ejectment brought by the widow to recover her dower, the probate of the will, and the proceedings thereon, are not competent evidence to prove the fact that the husband is dead, which is the very basis and foundation of the action, and without proof of which it cannot be maintained. The proof given on the probate of the will of a deceased husband has nothing to do with the question of the widow's right of dower in his real estate. The will itself

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could not cut off that right which the law confers upon her, nor could the final adjudication of the surrogate in any way strengthen or injure the widow's claim to a right to dower. The admission of the will to probate could not deprive her of her interest, nor its rejection in any way sustain it. The probate of the will was, therefore, of no sort of consequence in any respect, and entirely immaterial. So far as the widow was concerned she had no interest in the proceeding to prove the will which made its final determination conclusive as to her dower. The proceeding was not in the nature of a judgment of a court of competent jurisdiction, which was final and conclusive as to the subject-matter of the litigation, as the claim for dower was in no sense involved in the proof of the will before the surrogate. The English cases sustain the doctrine that letters of administration are not evidence of death, and that it must be otherwise proved. In *Thompson v. Donaldson*, 3 Esp. 63, Lord KENYON held that letters of administration are not sufficient proof of death, and remarked: "The death was a fact capable of proof otherwise." See, also, *Moons v. De Bernales*, 1 Russ. 301.

It will also be noticed that this is a case where the claim of title is made to real estate in an action of ejectment, to recover the same where more strict proof is required than in cases where the question arises incidentally and collaterally. See 2 Greenl. Ev., § 27; 2 Phil. Ev. 93.

In the views expressed, it is not intended to hold that cases may not arise where lapse of time and other circumstances may not make letters testamentary, and the proceedings accompanying the same, which have been had upon the proof of a will, competent evidence as ancient records, or from the lapse of time which has ensued since the probate (*Doe ex dem. Ash v. Calvert*, 2 Camp. 387); but in cases presenting the features of the one now considered, where the death is recent and the action brought so soon after the will was proven, and the alleged decease of the testator, it is enough to hold that the evidence introduced was not sufficient to establish his death, and that it must be proved otherwise.

Although all of the defendants but the infants admit the death of the testator, it is not enough to entitle the plaintiff to maintain the action. She cannot recover of all of them without proof of the testator's death, and it is apparent that she cannot in this action recover as to those alone who admit the death.

For the error of the judge upon the trial the judgment must be reversed and a new trial granted.

All concur.

Judgment reversed.

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NOTE.—In *Mutual Benefit Life Ins. Co. v. Lisdale*, 1 Otto. 238; S. C., 13 Alb. L. J. 82, which was an action on a life insurance policy by the widow of the insured, it was held that letters of administration upon the estate of the insured issued by a probate court, did not afford competent evidence of death. The opinion of the court, delivered by Mr. Justice HUNT, was as follows :

“ In an action brought, not as administrator, but in an individual character, to recover an individual debt, where the right of action depends upon the death of a third party — to wit, an insurance upon his life, — do letters of administration upon the estate of such person, issued by the proper probate court, afford legal evidence of his death ? This is the question we are called upon to decide. It is presented sharply, and is the only question in the case.

The authority in favor of the admission of the letters as evidence of the death of the party, in a suit between strangers, is a general statement to that effect in Greenl. Ev., § 550. The cases cited by the writer in support of the proposition are *Thompson v. Donaldson*, 3 Esp. 64 ; *French v. French*, Dick. 268 ; *Hamblin's case*, 3 Rob. (La.) R 130 ; *Jeffers v. Radcliff*, 10 N. H. 245. In the case first cited the authority does not support Mr. Greenleaf's statement. It was held that the letters did not afford sufficient proof of death, and no further evidence being given the verdict was against the claimant. In *French v. French* the court held in terms against the theory that the letters were evidence of death, “ but under all circumstances admitted the probate as evidence of death.” This case was that of a bill filed by an heir against one in possession of the estate, and in that case Mr. Greenleaf hardly contends that the letters are evidence of death. In *Tisdale v. Conn. Life Ins. Co.*, 26 Iowa, 177, and in the same case in 28 Iowa, 12, cited by the defendant in error, the law was held as claimed by her. The other cases cited by the defendant in error, including *Hamlin's case*, are those where the administrator or executor was a party to the suit in his representative capacity, in relation to which a different rule prevails.

In the New Hampshire case, above cited, there was evidence to sustain the ruling independently of the letters, and the case concedes that the law is otherwise in England, and bases itself upon the peculiar organization of the courts of that State.

On the other hand, the text-writers,—Phillips on Evidence (2d vol. 93, m, edition 1868), Tamlyn (48 Law Library), 154, referring to *Moons v. De Bernales*, Hubback on Succession, 162 (51 Law Library), concur against the rule laid down by Mr. Greenleaf.

In *Moons v. De Bernales*, 1 Russ. 307, it was held that letters of administration were not *prima facie* evidence of death, and the defect was supplied by other evidence. Lord ELDON says, in *Clayton v. Graham*, 10 Ves. 288, that it is the constant practice to require proof of death, and that probate is not sufficient. In *Leach v. Leach*, 8 Jur. 211, Sir KNIGHT BRUCE refused to order the payment of money upon letters alone, but required other evidence. In *Blackham's case*, 1 Salk. 290, it was held that the sentence of the spiritual court in granting letters is not evidence upon any collateral matter which would have prevented the issuing of the letters.

In speaking of judgments *in rem*, and where the judgment may be evidence against one not a party or privy to it, Mr. Starkie says : “ This class comprehends cases relating to marriage and bastardy where the ordinary has certified ; sentences relating to marriage and testamentary matters in the spiritual court.” 1 Stark. on Ev. 372, m. What is meant by this is explained at a subsequent place, where he says : “ The grant of a probate in the spiritual court is conclusive evidence against all as to the title to personalty and to all rights incident to the character of an executor or administrator.” Id. 374, m. He cites in support of this statement the case of *Allen v. Dundas*, 3 T. R. 125, that payment of money to an executor who has obtained probate of a forged will is a discharge to the debtor. The grant is conclusive to all business transacted as executor, and concerning the duties of the executor, that it was properly made.

This accords with the principle hereafter laid down.

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The chief ground of argument to admit letters testamentary as evidence of the death of the party, is that the order of the probate court issuing them is an order or judgment *in rem*. But a judgment *in rem* is not *prima facie* evidence ; it is conclusive of the point adjudicated unless impeached for fraud. 1 Stark. on Ev. 372, m ; *Freeman, infra*. If admissible on this principle, the letters were conclusive evidence of the death of Tisdale. But this is not claimed by any argument.

Again, the probate court has never adjudicated that Tisdale was dead. Death was not the *res* presented to it. Shall Mrs. Tisdale receive letters testamentary, was the *res*, and upon that only has there been an adjudication. Hubback, *supra*, 162, m.

The letters testamentary issued to an administrator by a probate court, as a general rule, are evidence only of their own existence. They prove, that is to say, that the authority incident to that office or duty has been devolved upon the person therein named, that he has been appointed, and that he is executor or administrator of the party therein assumed to have departed this life. Different States have different provisions as to who may be executor or administrator, excluding some persons and preferring others, in the order and manner in their statutes specified. Thus, persons convicted of infamous crime are excluded from this office, and persons of notoriously evil lives may be passed by in the discretion of the probate court. Sons or daughters or widows are entitled to take in preference to others ; unmarried women are entitled in preference to married women. Certain notices may be, and usually are, required to be given of the proceedings to obtain letters testamentary. On all this class of subjects the letters are the evidence that the proceedings have been regularly taken, and that the person or persons therein named are those by law entitled to the office. Upon these points the court has adjudicated. No proof to the contrary can be admitted in an action brought by the executor as such. Parties wishing to contest that point must do it before the probate court, at the time application is made for issuance of the letters, or upon subsequent application, as the case may require.

In an action brought by such executor or administrator touching the collection and settlement of the estate of the deceased, they are conclusive evidence of his right to sue for and receive whatever was due to the deceased. The letters are conclusive evidence of the probate of the will. It cannot be avoided collaterally by showing that it is a forgery, or that there is a subsequent will. The determination of the probate court is upon these precise points and is conclusive. 2 Smith's Lead. Cas. (6th Am. ed.) 669 ; *Vanderpoel v. Van Valkenberg*, 6 N. Y. 190 ; *Collins v. Ross*, 2 Paige, 396 ; *Freeman on Judgments*, 507, citing numerous cases.

If the present suit were brought by the plaintiff as executor or administrator to collect a debt due to her deceased husband, or to establish a claim arising under a will, of which probate had been made by her, she would have been within these rules. The letters testamentary would not only have been competent evidence, but they would have been conclusive of her right to maintain the action, and unimpeachable except for fraud. Such, however, is not the case before us. The suit is by the plaintiff as an individual, to recover a debt alleged to be due to her as an individual. It is a distinct and separate proceeding, in which the question of the death of the husband comes up collaterally. The books abound in cases which show that a judgment upon the precise point in controversy cannot be given in evidence in another suit, against one not a party or privy to the record. This rule is applied not only to civil cases, but to criminal cases, and to public judicial proceedings, which are of the nature of judgments *in rem*.

If an indictment for an assault and battery by A upon B is prosecuted to a conviction, the judgment for some purposes is conclusive evidence. Thus, upon a subsequent indictment for the same offense, it would be conclusive in favor of A that he had been once tried for the same offense and convicted, and that he could not again be put in jeopardy therefor. But if A sues B for the same assault and battery, it cannot be doubted that it would be incompetent to introduce the record in the criminal case as

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evidence of the offense. For this purpose it is "*inter alios acta*." B was no party to that proceeding. In theory of law he was not responsible for it or capable of being benefited by it. 1 Stark. on Ev. 317, *m*.

So, if B should afterward be indicted for an assault upon A, arising out of the same transaction, the record would not be competent evidence to show that A, and not B, was in fact the offending party.

In some States provision is made for the admeasurement and setting apart of dower to the widow of a deceased person. Officers are appointed for this purpose, who make their certificate awarding particular property to her use, and file their report in the proper office. Although the certificate is judicial in its character and assumes that the deceased had title to the property described, and the certificate is valueless except upon that supposition, it has still been held that it is no evidence of title, and that the title must be proved as in other cases. *Jackson v. Randall*, 5 Cow. 168; *Same v. Ely*, 6 id. 316.

It has been held that a comptroller's deed for the non-payment of a tax due the State is not even *prima facie* evidence of the facts giving him the right to sell, such as the assessment and non-payment of the tax, although they are recited in the deed, and this deed is in compliance with the statute. These facts must have existed to give a right to sell, but they are not established by the deed. They must be made out by independent proof. *Talman v. White*, 2 N. Y. 66; *Williams v. Peyton*, 4 Wheat. 77; *Beekman v. Bigham*, 5 N. Y. 366.

A certificate of naturalization issues from a court of record when there has been the proper proof made of a residence of five years, and that the applicant is of the age of twenty-one years, and is of good moral character. This certificate is, against all the world, a judgment of citizenship, from which may follow the right to vote and hold property. It is conclusive as such, but it cannot, in a distinct proceeding, be introduced as evidence of the residence or age at any particular time or place, or of the good character of the applicant. *Campbell v. Gordon*, 6 Cr. 176; *Stark v. Chesapeake Ins. Co.*, 7 id. 420.

The certificate of steamboat inspectors, under the act of Congress of 1852, is evidence that the vessel was inspected by the proper officer, but it is held that it is not evidence of the facts therein recited, when drawn in question by a stranger, although the officer was required by law to make a return of such facts. *Erickson v. Smith*, 2 Abb. Ct. of App. (N. Y.) 64; 38 How. Pr. 454.

So it has been held that where a sheriff sells real estate, giving to the purchaser a certificate thereof, although there can lawfully be no sale unless there be a previous judgment, and although the sale is based upon and assumes such judgment, and although the law requires the sheriff to give such certificate, the recital by the sheriff of such judgment furnishes no evidence thereof. It must be proved independently of the certificate. *Anderson v. James*, 4 Rob. Sup. Ct. 35.

So on an application by a wife for alimony, pending a divorce suit prosecuted against her, the fact that her husband has recovered a verdict against a third person for criminal connection with her, has been held not to be even presumptive evidence of her guilt. *Williams v. Williams*, 3 Barb. Ch. 628.

Authorities of this nature might be greatly extended. Enough has been said to demonstrate that neither upon principle nor authority was it proper, in the individual suit of Mrs. Tiedale against a stranger, to admit letters of administration upon the estate of her husband as evidence of his death.—REP.

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O'REILLY v. THE GUARDIAN MUTUAL LIFE INSURANCE COMPANY,
appellant.

(60 N. Y. 169.)

Life insurance — notice and proof of death — Condition precedent.

Where a policy of life insurance requires notice and proof of death as a condition precedent to payment, notice alone is not sufficient ; and though the insurers, on receipt of such notice, do not call for further proof, they do not thereby waive their right to insist upon it.

ACTION upon a policy of life insurance issued by the defendant company upon the joint lives of plaintiff and her husband.

The policy contained a clause providing for payment of the amount insured in sixty days after due notice and proof of death.

The plaintiff gave to defendant the following notice :

“ PROVIDENCE, Jan. 3d, 1872.

“ *The Guardian Mutual Life Insurance Company, New York:*

“ I hereby inform you that my husband, Michael O'Reilly, whose life was insured in your office, by policy 22,016, died in this city, on the fifteenth day of May last, after a short illness. Yours respectfully,

“ ELLEN O'REILLY.”

No other proof of death was given ; defendant made no response to this notice. Defendant moved for a nonsuit, on the ground, among others, that due notice and proof of death, as required by the policy, had not been given. The motion was denied, and defendant excepted.

A verdict was returned for the plaintiff, and the judgment entered thereon was affirmed by the General Term (3 N. Y. Sup. 487), and defendant appealed.

Samuel Hand, for appellant.

James Troy, for respondent. Plaintiff's proof was sufficient. Any defect was waived by the silence and failure to object of defendant. *Miller v. Eagle L. and H. Ins. Co.*, 2 E. D. S. 269 ; *N. Am. L. and Ac. Ins. Co. v. Burroughs*, 3 Big. L. and Ac. Cas. 755 ; 69 Penn. St. ; *Hincken v. M. L. B. Ins. Co.*, 6 Lans. 21 ; 50 N. Y. 657. The clause of the policy providing for preliminary proofs must be expounded liberally in favor of the assured. *Walsh v. Wash. Ins. Co.*, 32 N. Y. 442 ; *Talcot v. M. Ins. Co.*, 2 Johns. 136 ; Bliss on L. Ins. Co. 108, 410, § 252 ; *Banker*

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v. *Phoenix Ins. Co.*, 8 Johns. 317 ; *Lawrence v. Ocean Ins. Co.*, 11 id. 259 , *Uhild v. F. M. Ins. Co.*, 3 Sandf. 41 ; *Miller v. Eagle L. and H. Ins. Co.*, 2 E. D. S. 269 ; *Lenox v. U. Ins. Co.*, 3 Johns. Cas. 224 ; 4 id. 131 ; *McLaughlin v. Wash. Ins. Co.*, 23 Wend. 525 ; *Francis v. Ocean Ins. Co.*, 6 Cow. 604 ; *Aetna Ins. Co. v. Tyler*, 16 Wend. 401 ; *McMasters v. West. Ins. Co.*, 25 id. 379 ; *Lurley v. N. A. F. Ins. Co.*, id. 374 ; *Miller's case*, 1 Big. L. and Ac. Cas. 375 ; Bliss on Ins. 422, § 263.

ALLEN, J. The sum insured upon the joint lives of the plaintiff and Michael O'Reilly was, upon the death of either, payable to the survivor in sixty days after due notice and proof of such death. It is objected by the defendant, that no proof of the death of either of the insured was made to the company, and for that reason the action is premature. By the terms of the contract the insurers have the full time of sixty days after proof of death, within which to pay the money, and no action can be maintained upon the policy until after the expiration of that time. It is conceded that notice of the death of Michael O'Reilly was given. The notice was in the form of a letter from the plaintiff to the defendant, dated June 3d, 1872, commencing : "I hereby inform you," and stating that Michael O'Reilly, the husband of the writer, and one of the insured, had died in Providence, R. I., on the fifteenth of May preceding, after a short illness. As a notice, the letter was a full compliance with the requirements of the policy, and gave all the information the company could require under the condition that notice should be given. It was held upon the trial that it served the purpose of and was proof of the death of Michael, sufficient as the preliminary proof also required by the terms of the policy so as to give an action after the lapse of sixty days from the time of its receipt by the defendant. The notice and proof of death, required as conditions precedent to a right of action upon the contract, were distinct and separate acts. "Proof" of death, if seasonably made, might serve for both the proof and notice contemplated, as the more authentic and verified information, contained in the "proofs," would ordinarily include all the particulars which would be communicated by the informal notice. But the converse is not true. A mere notice cannot supply the place of, or dispense with, the more formal proof provided for in the policy. The two are entirely distinct in their character, and are mentioned as two distinct acts to be performed by one who claims the benefit of the insurance. A notice may be and usually is, as in this case, an informal, unverified and uncorroborated assertion of the claimant, the party in interest. It is ordinarily given immediately after the happening of the event. There need be no delay in notifying the insurers

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while the making of formal proofs may be a work of time. What the character of the "proof" should be when not prescribed by the terms of the policy must depend very much upon the fact to be proved, and the evidences by which it is ordinarily established, or of which it is susceptible. But that proof, as that term is used, means something more than the unverified declaration of the party in interest, whether formal or informal, may be laid down as a self-evident proposition. Else why require "proof" in addition to "notice?" If "notice," information or advice by the party in interest is proof, the one word would have sufficed, and the second word has no place in the condition or office to perform. "Proof," as in addition to notice, must mean evidence in some form, such form as is usual and customary in such cases, or as is recognized by law, and is calculated to convince or persuade the mind of the truth of the fact alleged. The bare statement of one of known character for truth might convince one who knew him of the reality of the facts stated by him, but it would not be proof, in any proper sense. Proof is frequently used as the synonym of "evidence" (1 Greenl. Ev., § 1), and it was probably so used in this instance. The condition can only be performed by furnishing evidence in some form of the truth of the fact stated in the notice, and upon which the right of action depends. It need not be that full, clear and explicit proof, which would be required upon the trial of an issue upon the question, but it must be such reasonable evidence as the party can command at the time, to give assurance that the event has happened, upon which the liability of the insurers depends. *Walsh v. Marine Ins. Co.*, 32 N. Y. 427. The purpose of the condition is that the insurer may be able intelligently to form some estimate of his rights and liabilities before he is obliged to pay, and some proof must be exhibited. 2 Arn. on Ins. 1200. In *Lenox v. United Ins. Co.*, 3 Johns. Cas. 224, it was held that the protest of the master was sufficient as preliminary proof of the loss of a vessel as it was proof in the customary form. The court did not pass upon the question whether proof by affidavit or under oath was contemplated or necessary in all cases, but the protest was held sufficient as the customary evidence in such cases, and that was proof under oath, and so stated to be by the court. The same evidence was held sufficient in *Talcot v. Marine Ins. Co.*, 2 Johns. 130. It was the usual documentary evidence of the fact alleged. See also *Munson v. New England Marine Ins. Co.*, 4 Mass. 88. *Taylor v. Aetna Life Ins. Co.*, 13 Gray, 434, was an action on a life policy, and the court, by METCALF, J., says, commenting upon a similar condition, that "such notice and proof were prerequisite to the maintenance of this action." Proof had been furnished

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the company ; and the defendant admitted that there was no defect in the proof of death, unless in order to constitute due proof thereof it was necessary to produce a sworn certificate of the attending physician. The court held that the insurers, not having made the production of such certificate a condition of the policy, could not insist upon it, but that any proof which was reasonably sufficient in law would be a compliance with the condition. What is proof must be determined according to the rules of evidence so far as they can be applied to extra-judicial proceedings. The parties may prescribe the character of the proofs to be made, but in this case they have not done so, and it is left to be determined by general principles applicable to like cases. As no proof of the death of Michael O'Reilly was furnished or attempted to be furnished, we are not called upon to say what proof would answer the call of the policy. There being no proof of any kind furnished, the condition precedent to an action was not performed.

The defendant did not waive the condition or the furnishing of proof of death by omitting to notify the plaintiff that the notice was not proof. The notice was sufficient as a notice, and did not purport to be more than a mere notice.

It would have been impertinent to have notified the plaintiff that a paper, not purporting to be proof, was not sufficient proof of the death of the party.

The judgment must be reversed, and a new trial granted.

All concur.

Judgment reversed.

LOWERY v. THE WESTERN UNION TELEGRAPH COMPANY, appellant.

(60 N. Y. 198.)

Telegraph — error in transmission — damages.

B. sent a message by defendant's telegraph to plaintiff, asking for \$500. By negligence of defendant's servant the message was changed to \$5,000, which sum plaintiff sent, and B. absconded with it. *Held*, that defendant was not liable for the loss, its negligence not being the proximate cause thereof.

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ACTION to recover damages for loss alleged to have occurred through defendant's negligence.

One D. A. Brown delivered at defendant's office at Chicago, a message to be sent to plaintiff at Rochester, requesting the latter to send to him \$500. The message was changed through the negligence of defendant's servant, so that it read, when it reached plaintiff, \$5,000, which sum, on receipt, plaintiff, supposing the message accurate, sent to Brown by express, who, upon receiving it, appropriated it to his own use and absconded. Plaintiff, through legal proceedings against Brown, recovered \$2,251.95. The referee directed judgment against defendant for the residue of the loss, with interest. This judgment was affirmed at General Term, and defendant appealed.

Geo. W. Soren, for appellant.

F. A. Macomber, for respondent. The message was by its terms a notice to defendant of the loss plaintiff might sustain by any error in its transmission. *Squire v. W. U. Tel. Co.*, 98 Mass. 232; *U. S. Tel. Co. v. Wenger*, 55 Penn. St. 262; *Leonard v. N. Y. Tel. Co.*, 41 N. Y. 544; S. C., 1 Am. Rep. 446; *Elwood v. W. U. Tel. Co.*, 45 id. 556; S. C., 6 Am. Rep. 140. The mistake in the message is *prima facie* evidence of negligence. *Rittenhouse v. Ind. Line Tel. Co.*, 44 N. Y. 263; 4 Am. Rep. 673; *Leonard v. N. Y. Tel. Co.*, *supra*. Plaintiff is not bound by the terms of the printed conditions on the blank whether the sender was so bound or not. 13 Am. L. Reg. 193; 8 id. 475; *N. Y. Wash. P. Tel. Co. v. Dryburg*, 35 Penn. St. 298; *Lane v. Cotton*, 12 Mod. 488; S. C., 1 Ld. Raym. 646; Paley on Agency, 396; Story on Agency, §§ 808, 809, 314, 315; *Bowen v. Lake E. Tel. Co.*, 1 Am. L. Reg. 685; *De Rutte v. N. Y. A. and B. E. M. Tel. Co.*, 1 Daly, 547; *Leonard v. N. Y., etc., Tel. Co.*, *supra*; *Elwood v. W. U. Tel. Co.*, *supra*; *De La Grange v. S. W. Tel. Co.*, 25 La. Ann. 383. Plaintiff is entitled to recover the money lost, with his necessary expenses in making the loss as light as possible. Sedgw. on Dam. (ed. 1869), 85, 97, marg. p. 79, note 2; *Davis v. Garrett*, 6 Bing. 716; 19 Eng. C. L. 212; *Maquin v. Dinsmore*, 10 Alb. L. J. 314; *Scott v. Shepherd*, 2 W. Black. 892; *Vandenburg v. Truax*, 4 Denio, 464; *Webb v. R. W. and O. R. R. Co.*, 49 N. Y. 420; 10 Am. Rep. 389; *Fent v. T. P. and W. R. Co.*, 59 Ill. 349; *R. R. Co. v. Mfg. Co.*, 16 Wall. 327; *McDonald v. Snetting*; *Wilson v. Newport Dock Co.*, 1 L. R. 177; *Condict v. G. T. R. Co.*, 54 N. Y. 505; *Michaels v. N. Y. C. R. R. Co.*, 30 id. 572; *Read v. Spaulding*, id. 639; *Bostwick v. B. and O. R. R. Co.*, 45 id. 717.

ANDREWS, J. That there was negligence on the part of the defendant

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ii. changing the message before delivery, from a request by Brown that the plaintiff should send him \$500, to a request for \$5,000, is found by the referee, and the finding is fully justified by the proof; and that the plaintiff acted upon the message as delivered, and sent the \$5,000 to Brown, who afterward absconded, having appropriated the money to his own use, is also established. It is clear, also, that except for the negligent mistake of the defendant, the loss would not have happened, or, at most, it would not have exceeded the sum which Brown requested the plaintiff to send him. The question is therefore presented, upon which courts are frequently called to pass, whether there is such a connection between the wrong alleged and the resulting injury, that in contemplation of law they stand related to each other as cause and effect, so as to give a right of action against the wrong-doer, and make him chargeable with the loss. The law does not undertake to hold a person who is chargeable with a breach of duty toward another, with all the possible consequences of his wrongful act. It, in general, takes cognizance only of those consequences which are the natural and probable result of the wrong complained of, and which, in the language of POLLOCK, C. B., in *Rigley v. Hewitt*, 5 Exch. 240, may reasonably be expected to result, under ordinary circumstances, from the misconduct. Every injury is preceded by circumstances, if any one of which had been wanting the injury would not have happened. In some sense, therefore, each is a cause of the injury, but to fasten a legal responsibility for the injury upon every person whose wrongful act, however remote therefrom, had contributed to bring about a situation or condition which made the injury possible, would be an impracticable rule, and one which, if enforced, would, in most cases, inflict a punishment wholly disproportioned to the wrong. There is no serious conflict of authority in the statement of the general rule, that a wrong-doer is liable only for the natural and proximate consequences of his wrongful act, but, in the application of the rule to particular cases, there is often great difficulty, and the rule, if not qualified, is very broadly and liberally construed for the protection of the plaintiff, where the act of the wrong-doer was willful and malicious, or was committed fraudulently or recklessly, and without regard to consequences. In such cases, the law does not measure very carefully the distance between the wrongful act and the injurious consequence in fixing the limit of responsibility, and what are called exemplary damages are sometimes allowed, not as a compensation to the plaintiff, but as a punishment for criminal, willful, or reckless misconduct of the defendant.

The rule which prescribes that the damages which may be recovered

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actions of tort must be those which are the natural and proximate result of the wrong, does not require that the recovery shall be confined to damages which immediately flow from the wrongful act, nor are damages necessarily to be disallowed because they are connected with the wrong by intermediate agencies, through which it has operated to produce the loss.

The *Squib* case, 2 Wm. Black. 892, and the *Negro Boy* case, 4 Den. 364, illustrate this proposition. In neither did the injury immediately result from the defendant's act. But he set in motion a force which continued to operate until the injury was accomplished. If the last man who threw the squib had not thrown it the plaintiff would not have been injured; but, in throwing it, he acted instinctively for his own protection and it was justly regarded as the act of the defendant, and a continuation of the original force; and the boy, who in trying to escape from the angry pursuit of the defendant knocked the faucet out of the cask of wine, was the force set in motion by the defendant which caused the loss. It is not easy, and it is probably impossible, to furnish any single test by which it may be determined in all cases whether damages claimed in an action of tort are sufficiently proximate to authorize a recovery. They are considered too remote when, though arising out of the cause of action, they could not, in the ordinary course of things, be expected to have arisen, and do not naturally flow from the wrong. Mayne on Damages, 26. So, also, where they have been immediately caused by the independent, willful, or tortious act of a third person, intervening between the misconduct of the defendant and the damage, if such intervening wrong could not naturally or reasonably have been anticipated. *Crain v. Petrie*, 6 Hill, 522; *Vicars v. Wilcocks*, 8 East, 1; *Knight v. Gibbs*, 1 A. & E. 43; Mayne on Dam. 40. "To maintain an action for special damages," says NELSON, C. J., in *Crain v. Petrie*, "they must appear to be the legal and natural consequences arising from the tort, and not from the wrongful act of a third person, remotely induced thereby. In other words, the damages must proceed wholly and exclusively from the injury complained of."

The recovery allowed in this case cannot, I think, be maintained within the principles governing the liability of a defendant in an action for negligence. The mistake of the telegraph company was the antecedent of the loss sustained by the plaintiff, but it was not, in a juridical sense, the cause of it.

The plaintiff parted with his money by reason of the message, believing it to have been sent by Brown. He was willing to trust him with the \$5,000, and the mistake of the company did not induce the confidence

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which the plaintiff had in his integrity. When the money came to the possession of Brown he held it as the agent and trustee of the plaintiff. The plaintiff did not lose his title to it. He could reclaim it, and he did subsequently recover a part of it by legal proceedings. If Brown had not, after receiving the money, wrongfully converted it, the plaintiff's loss would have been comparatively trifling. The embezzlement could not reasonably have been expected, and did not naturally flow from the wrong of the defendant. The cause of the loss was the criminal act of Brown conceived and executed after the defendant had ceased to have any relation to the money. The plaintiff's right of action for the negligence was complete before the money was misappropriated by Brown; and, if suit had then been brought, the damages would not have been measured by the amount of money sent by the plaintiff. The most that can be said is, that by the negligence of the company, an opportunity was afforded Brown to commit a fraud upon the plaintiff. This does not, within the cases, make the company chargeable with the loss resulting from the conversion. See *Bank of Ireland v. Evans' Trustees*, 5 H. L. Cases, 389; *Salem Bank v. Gloucester Bank*, 17 Mass. 1.

The referee has found that the change in the message was the result of gross negligence upon the part of the defendant. The complaint is upon a liability for negligence simply. There is no pretense that the change in the message was intentionally or fraudulently made, and there is no evidence of any conduct on the part of the defendant, its agent or servants, equivalent to fraud. The referee was justified in finding that the defendant omitted to use the ordinary skill which is practiced in the art of telegraphy, which omission he has denominated gross negligence, but the finding upon the evidence and facts in this case does not, I think, enlarge the measure of liability.

For the error of the referee, in respect to the measure of damages, the judgment should be reversed, and a new trial ordered, with costs to abide the event.

All concur; FOLGER and MILLER, JJ., not sitting.

Judgment reversed.

KERRAINS V. THE PEOPLE.

(60 N. Y. 221.)

Landlord and tenant — when employee occupies as servant and when as tenant. Evidence — of intent.

Where the occupancy of the employer's house by the employee is connected with the ser-

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vice, or is required for the necessary or better performance of the service, the employee holds as a servant and the possession is in the master ; but where the occupancy is exclusive, and independent of and in no way connected with the service, the holding is as a tenant.

A employed B to work in his mill, agreeing to pay him certain wages per day and to give him the use of a house which was part of the mill property, and which had before been occupied by B while working in the mill. *Held*, that B held the house as a servant and not as a tenant.

When the motive of a witness in performing a particular act or in making a particular declaration becomes material in a cause, he may himself be sworn in regard to it.

On the trial of an indictment for assault with a deadly weapon with intent to kill, defendant was asked as to his intent in procuring the weapon. *Held* competent.

INDICTMENT for assault with a deadly weapon with intent to kill. The defendant was convicted ; the General Term affirmed the conviction (1 N. Y. Sup. 333), and the defendant brought the case to this court by writ of error.

In January, 1871, Kerrains, the plaintiff in error, entered into a verbal contract with Isaac Son to work in Son's paper mill for a year (or as Son testified, "for a year if they could agree"), Son to pay him thirteen shillings a day and to furnish him with the house where he then resided. This house belonged to the mill property, and had been occupied for several years previously by Kerrains while engaged as a laborer in the mill. Kerrains claimed that by the contract he was not to be required to "haul the bleach."

He worked for Son until the latter part of June, 1871, when Son requested him to "haul the bleach ;" this he refused, and Son discharged him, paid him up, and told him to leave the premises or he would bring a force to throw his things out. Kerrains refused to leave. On the 5th of July, 1871, Son went to the house with two men and commenced removing Kerrains' furniture. The latter was absent at the time, but was sent for by his wife ; he, returning, saw what was going on, went to the wood-house, picked up an axe and went into the house and ordered Son and the men out. Son refused to go, presented a pistol ; an altercation occurred, during which Kerrains struck Son with the axe, inflicting a serious injury. Kerrains was sworn as a witness in his own behalf, upon the trial, and was asked : "What was your intention in taking the axe from the shed to the house ?" This was objected to, and objection sustained, and the prisoner's counsel duly excepted. The court charged, among other things, in substance, that the prisoner occupied the house as servant, not as tenant ; that Son had the right of possession and to remove the prisoner with his effects, and to employ all the necessary force for that purpose. To which the prisoner's counsel excepted.

R. E. Andrews, for plaintiff in error.

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Chas. L. Beale, for defendants in error. The relation between Son and plaintiff in error was that of master and servant. *Haywood v. Miller*, 3 Hill, 90; *People v. Annis*, 45 Barb. 304; *Doyle v. Gibbs*, 6 Lans. 180; *Perring v. Brook*, 32 E. C. L. 543; *Mayhew v. Suttle*, 82 id. 347; *Rollins v. Riley*, 44 N. H. 9; *Doe v. Derry*, 38 E. C. L. 194. The possession of plaintiff in error was not independent of that of Son. *People v. Fields*, 1 Lans. 245; *Haywood v. Miller*, 3 Hill, 90; *People v. Annis*, 45 Barb. 304; *Putnam v. Wise*, 1 Hill, 248; *Mayhew v. Suttle*, 82 E. C. L. 353; *Taylor v. Bradley*, 39 N. Y. 129, 137, 138; *Wilbor v. Sisson*, 53 Barb. 262. If Son had been a trespasser plaintiff in error would not have been justified in making the assault. *People v. Gulick*, Lalor's Sup. to H. & D. 229, 230; *Scribner v. Beach*, 4 Den. 449. The assault having been made with a deadly weapon, malice is to be inferred. *People v. Vinegar*, 1 Park. Cr. 24, 25; *People v. Shaw*, id. 327, 329. Son's quietude from the day of discharge was not a permission to plaintiff in error to occupy the premises, nor did it constitute a tenancy for years at will or sufferance. *Doyle v. Gibbs*, 6 Lans. 180; *Smith v. Littlefield*, 51 N. Y. 539. If Son threatened plaintiff in error he had a right to use only such means of flight or force as would have prevented the injury apprehended. 1 Colby's Cr. Pro. 602-604; 1 East's P. C., ch. 5, § 51; 1 Arch. Cr. Pr. 224; Fost. 276; 1 Hale, 481, 483, 484; 1 Hawk., ch. 29, §§ 13, 14; 1 East's Cr. L. 271, 272; *Shorter v. People*, 2 N. Y. 193; *Uhl v. People*, 5 Park. Cr. 410; *People v. Cole*, 4 id. 35; *People v. Austin*, 1 id. 154.

CHURCH, Ch. J. The principal question of law contested on the trial and elaborately argued in this court, is, whether the relation of master and servant, or landlord and tenant, existed between the prisoner and the prosecutor, Mr. Son, in respect to the house occupied by the former. Although not decisive of the guilt or innocence of the prisoner, the determination of the question had properly a material influence.

If the relation of master and servant existed it would follow that the legal possession of the house was in the prosecutor, and he had the legal right to remove the furniture and goods therein, and to employ the necessary force for that purpose, and that the defendant would not be justified in using force to prevent it. And yet, if the acts of the prosecutor were of such a threatening character, by the use of a pistol or other deadly weapon, that the prisoner believed, and had reason to believe, that his life was in imminent danger, he might be justified in using the necessary means to avert it. On the other hand, if the prisoner was holding the house as a tenant, and had a lawful right to defend his possession,

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and his property, by the use of proper and necessary means, yet, if the force used was unnecessary or excessive, either in amount or the kind of weapon employed under the circumstances presented, and after making due allowance for provocation and irritation, he might still be amenable to a criminal prosecution.

The court charged the jury that the prisoner occupied the house as a servant, and not as a tenant; and hence that the prosecutor had the legal possession.

The defendant stated the contract to be, that he was to work for Mr. Son a year at thirteen shillings a day, and have the use of the house he lived in and garden for that period. The prosecutor stated it substantially the same. He said: "I made a bargain with him for a year, if he and I could agree; I was to pay him thirteen shillings a day, and he was to have a house furnished him." There was no dispute but that the defendant was to have *the* house in which he then resided. It does not appear whether the wages were less by reason of furnishing the house, or whether any or what allowance was intended on that account. Nor does it distinctly appear whether a residence in that particular house was necessary to the proper discharge of the duties of the defendant. If the occupation is connected with the service, or if it is required, expressly or impliedly, by the employer for the necessary or better performance of the service, then it is for his benefit, and he continues in possession. Such was clearly the case of *Haywood v. Miller*, 3 Hill, 90, where a farmer hired a man and his wife to work a farm for wages. The occupation of the house was necessary to the performance of the service; and *The People v. Annis*, 45 Barb. 304, was substantially the same, although I am unable to agree with the learned judge who delivered the opinion in that case, that immediately upon the termination of the service a tenancy at will, or by sufferance, springs up. In order to have that effect the occupancy must be sufficiently long to warrant an inference of consent to a different holding. Any considerable delay would be sufficient, but I can see no principle which would change the occupant, *eo instanti*, from a mere licensee to a tenant. The employer should resume control of his property within a reasonable time, or consent would be inferred. Whether this time is a day or a week may depend upon circumstances. In *Doyle v. Gibbs*, 6 Lans. 180, the consent of the employer that the employed might remain until his wife recovered from an illness, was held not to amount to a consent.

The circumstance that the right of occupation terminates with the abrogation of the contract of service, by consent or by the discharge of the servant, is not decisive. The question is, what was the character of

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the holding under the contract? If that was a tenancy, then the party holding over would be a tenant at will, and the landlord would not be justified in entering with strong hand. So, while a deduction from wages of a specified sum for the use, or the absence of such an arrangement would be a material circumstance, it would not be in all cases conclusive either way. The question depends upon the nature of the holding, whether it is exclusive and independent of, and in no way connected with the service, or whether it is so connected, or is necessary for its performance. And this, I think, is the result of all the cases. The question has often arisen in England, under the poor laws, to determine what occupation would confer a settlement, the courts recognizing, as controlling the distinction between an occupation as a tenant or as a servant: *R. v. Minster*, 3 M. & S. 276; *R. v. Kelstern*, 5 id. 136; *R. v. Chestnut*, 1 B. & Ald. 473; *R. v. Melkridge*, 1 T. R. 598; *R. v. Langrville*, 10 B. & C. 899; *R. v. Benneworth*, 2 id. 755. The case of *Hughes v. Chatham*, 5 M. & G. 54, arose under the Reform Act, requiring a registry of voters, the statute requiring that the person should *occupy as owner or tenant*. The facts were, that a master rope-maker in a royal dock-yard had, as such, a house in the dock-yard for his residence, of which he had the exclusive use, without paying rent, as part remuneration for his services, no part of it being used for public purposes. If he had not had it, he would have had an allowance for a house, in addition to his salary. The case was elaborately argued, and thoroughly considered, and it was held, that the rope-maker occupied as a tenant, and not as a servant. FINDAL, C. J., in delivering the opinion of the court, said: "There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee for years or at will, or for any other estate or interest, and if he do so the servant then becomes entitled to the legal incidents of the estate, as much as if it were purchased for any other consideration." * * * "And, as there is nothing in the facts stated to show that the claimant was required to occupy the house for the performance of his services, or did occupy in order to their performance, or that it was conducive to that purpose more than any house which he might have paid for in any other way than by his services; and as the case expressly finds that he had the house as part remuneration for his services, we cannot say that the conclusion at which the revising barrister has arrived is wrong."

I have cited the language of the court, because it lays down concisely the correct rule for determining the question involved in this class of cases. The question in the case before us is presented somewhat differ-

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ently. Each party relied upon the terms of the contract, with only the additional facts that the house was a part of the mill property, and had been occupied for several years previously by the prisoner while engaged as a laborer in the mill. There was no request to submit the facts to the jury to determine whether the house was occupied to enable the prisoner the better to perform the service in which he was engaged; or, in other words, whether it was not occupied as an appendage to the mill, and really for the benefit of the owner; nor was there any evidence of an allowance for rent, but it was left to the court, upon the contract and facts before stated, to be determined as a question of law, and, in my judgment, the court decided correctly, that the defendant occupied as a servant, and not as a tenant. The inference from these facts is reasonable, if not irresistible, in the absence of any provision for an allowance for rent, that the house was intended to be occupied by an employee for the benefit of the owner in carrying on the mill. The case thus presented is analogous to that of a person employing a coachman or gardener, and allowing or requiring him to reside in a house provided for that purpose on the premises; or a farmer who hires a laborer for wages, to work his farm, and live in a house upon the same. In these cases the character of the holding is clearly indicated by the mere statement of facts. It is not impossible that other facts may exist to strengthen or weaken the inference that the prisoner occupied as a servant, and not as a tenant, but from the facts proved there was no error in holding that he occupied as a servant. Both parties regarded it as a question of law upon substantially undisputed facts, although there are cases where the character of the holding is so uncertain, from conflicting evidence or inferences which may be drawn, as to render it proper to submit the question to a jury. 3 M. & S. 790.

It appears that the prisoner was absent at work when the prosecutor went, with his men, to the house to remove the furniture, etc., but soon returned and went to the wood-house, and came back with the axe in his hand, with which, afterward, the blow was inflicted. When the prisoner was upon the stand, as a witness, his counsel asked him the question: "What was your intention in taking the axe from the shed to the house?" To which there was an objection, which was sustained, and an exception taken. The General Term sustained this ruling upon the ground that it was too remote, and that the prisoner could only speak as to his intent at the time of striking the blow. I cannot concur with this view as applied to the question involved. The intent to kill was indispensable to be established by the prosecution. It constituted the vital element of the offense, and although it is true that the time when that intent must

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exist was when the blow was struck, yet it was competent for the defendant to testify to any fact tending to disprove such intent. It is a fact to be established, and, of course, may be repelled. The prisoner having inflicted the injury with the axe, his previously going to the shed after it was a circumstance bearing upon his intent in striking the blow, and from which an inference that he procured it for that purpose might be claimed to result. It was a legitimate circumstance to prove the fact of intent. If his taking the axe was not for that purpose, but for an innocent purpose, while it would not conclusively disprove the intent at the time of striking the blow, it would tend to destroy a material circumstance bearing upon that question against him. If he could disprove the intent at the time of the act by a general denial, it follows that he might disprove any fact tending to establish it. His going to the shed for the axe would be immaterial, except for the purpose of showing that he brought it to be used as it was used, and if that purpose is disproved, it renders the circumstance of no moment. The rule is very well stated by HOGEBOM, J., in *McKown v. Hunter*, 30 N. Y. 625. After citing 4 Kern. 567; 21 N. Y. 121; 25 id. 630, he says: "These cases go very far to establish the general principle that when the motive of a witness in performing a particular act, or making a particular declaration, becomes a material issue in a cause, or reflects important light upon such issue, he may himself be sworn in regard to it, notwithstanding the difficulty of furnishing contradictory evidence, and notwithstanding the diminished credit to which his testimony may be entitled as coming from the mouth of an interested witness." The motive for procuring the axe was a fact material upon the principal fact in the case, and it was clearly competent for the prisoner to testify in respect to it.

We do not deem it necessary to notice the other points made. For this error the judgment must be reversed, and a new trial granted.

All concur; except ANDREWS and MILLER, JJ., not voting.

Judgment reversed.

CESAR v. KARUTZ, appellant.

(60 N. Y. 229.)

Landlord and tenant — liability of landlord for leasing infected premises

A landlord who lets premises, knowing they are infected by a contagious disease, without notifying the tenant thereof, is liable to the latter, for the damages sustained, in case the disease is communicated.

* See also *Minor v. Sharon*, 17 Am. Rep. 122 and note.

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APPEAL from judgment of the General Term of the City Court of Brooklyn, affirming a judgment in favor of plaintiff entered upon a verdict.

Action to recover damages by the alleged leasing by defendant to plaintiff of apartments infected with the small-pox, of which defendant had notice but did not notify plaintiff; in consequence of which the latter caught the disease.

The facts sufficiently appear in the opinion.

Judgment was entered for the plaintiff on a verdict and was affirmed at the General Term of the City Court of Brooklyn.

John H. Thomas, for appellant. As the complaint charged culpable negligence the proof must be such as will not admit of reasonable doubt. 1 Stark. Ev. 544. Defendant being ignorant of the infection cannot be made liable. S. & R. on Neg. 3, § 5. The maxim *caveat emptor* applies to the transfer and letting of all unfurnished premises. *Cleves v. Willoughby*, 7 Hill, 86; *Lowndes v. Lane*, 2 Cox, 363; *Brown v. Edginon*, 2 Scott N. R. 504. Plaintiff cannot recover unless it is proved that defendant, by some act or omission, violated a duty resting upon him. *McGrath v. H. R. R. R. Co.*, 32 Barb. 146. Plaintiff, by omitting to take the precautions afforded by the present state of science, was guilty of culpable negligence. S. & R. on Neg., §§ 2, 25; 18 Barb. 80; 8 Penn. 366; H. & N. 679; *Cleveland v. Spier*, 16 C. B. (N. S.) 399.

Frederic A. Ward, for respondent. It was defendant's duty to inform plaintiff of the existence of the infection. *Pickard v. Collins*, 23 Barb. 445; Evans' Poth., pt. 1, ch. 2, art. 3, p. 166; *Barney v. Burnstenbinder*, 64 Barb. 212; *Lynch v. Nurdin*, 1 Q. B. 29, 35; *Flight v. Thomas*, 10 Ad. & Ell. 590; Broom's Leg. Max., §§ 238, 347, 348; *Rex v. White*, 1 Burr. 333; *Barnes v. Ward*, 9 C. B. 392; *Chapman v. Rothwell*, 1 E. B. & E. 168; *B. and A. R. R. Co. v. Shanly*, 107 Mass. 568; *Fletcher v. Rylands*, 12 Jur. (N. S.) 603. By failing to do this defendant is responsible whether he did it willfully or negligently. *Vanderburgh v. Truax*, 4 Den. 466; *Myers v. Malcolm*, 6 Hill, 292; *People v. Sands*, 1 Johns. 78; *Loomis v. Terry*, 17 Wend. 498; *Rex v. Lester*, 3 Jur. (N. S.) 570; *Thomas v. Winchester*, 2 Seld. 397; *Jeffrey v. Bigelow*, 13 Wend. 518; *Longmeid v. Holliday*, 9 L. Eq. 562; *Deane v. Clayton*, 7 Taunt. 489; *Eckert v. L. I. R. R. Co.*, 43 N. Y. 502; *Rex v. Vantandillo*, 4 M. & S. 73; *Rex v. Burnett*, id. 272; Hale's P. C. 432.

RAPALLO, J. There can be no doubt that, if the facts were as alleged by the plaintiff in her complaint, she had a good cause of action against

the defendant. It appears in evidence that; on the 16th of April, 1872, the plaintiff, being in search of apartments for herself and her three children, she applied to the defendant, who was the owner of a tenement house at No. 54 Bushwick avenue, Brooklyn, and he then exhibited to her two rooms on the third story of this house, which she hired. On the twentieth of April she cleaned out the rooms, and on the twenty-second moved in, with her children, and occupied them. During the first few days of May she was taken ill with the small-pox and afterward removed to the hospital. She now alleges that she contracted the disease in those rooms; that, prior to her hiring them, they had been occupied by a family, one of whose members a child, had died there of this disease; that the defendant had notice of this fact at the time he let the rooms to her, but had taken no measures to disinfect the rooms, and suppressed from her the fact that they were infected. The judge submitted the case to the jury, charging them, "that if a landlord lets premises to a tenant, and they are infected, and he knows it, it is his duty to let the tenant know it." The judge further charged that, unless the defendant knew, or had reasonable notice that the premises were infected, the plaintiff could not recover. The jury found in favor of the plaintiff on these issues, and awarded her \$1,500 damages.

We think the instructions to the jury were correct, and that none of the exceptions taken to the rulings at the trial present any serious question unless it be the exception to the refusal to nonsuit the plaintiff on the ground of want of proof of the defendant's knowledge of the unhealthy condition of the rooms at the time he let them. The proof on this point, it must be conceded, is, by no means, conclusive or satisfactory; but, looking at the whole evidence, we cannot say that it was insufficient to warrant the submission of the question to the jury.

It appears that on the 22d of January, 1872, the rooms in question were hired and taken possession of by an English family named Deyoe. One witness testified that Mr. Deyoe, when he came there, had his face badly spotted with small-pox, showing that he had had it but was over it that, on or about the twenty-fifth of January, one of Deyoe's children, an infant, died in those rooms; that on the twenty-fifth a coroner's inquest was held upon the body. The coroner was called as a witness by the defendant, and produced his book, in which was an entry: "January twenty-fifth. John Deyoe, five months, No. 54 Bushwick avenue, small-pox." The coroner testified that he had no recollection, independent of the book. But the entry was put in evidence without objection and in fact by the defendant himself, and both parties seem to have treated it as properly verified. The book contained a further entry of the inquest in

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the same house : " May seventh, Charles Keyse, two years old." The coroner, and also the mother of the child, testified that the cause of this death was small-pox. The plaintiff testified that in August, after she had returned from the hospital, she told the defendant that she had got the small-pox in the room he had let her, and he replied that he did not believe that, but that he believed she got it from the Keyeses when Keyse's child died. Another witness, Mrs. Huber, testified that after the plaintiff had taken the disease she, the witness, told defendant that the plaintiff must have got the disease from the first floor (where the Keyeses lived), and he said no, she must have got it from the room up stairs, referring to the room which the English family had occupied and which was afterward let to the plaintiff.

This evidence tended to establish that the rooms were, in fact, infected. It is true several witnesses testified that when the Deyoe child died it was given out that it died of croup ; that they saw the body and it bore no traces of small-pox ; but it was for the jury to weigh this conflicting evidence.

The evidence of the defendant's knowledge depends mainly upon the testimony of Mrs. Huber. His declarations, before referred to, were all made after the plaintiff's illness, and do not show any knowledge at the time of letting the rooms to her. But Mrs. Huber testifies that after the Deyoe child died, the Deyoes fumigated the room and produced a very disagreeable smell ; that witness complained of this at the time to the defendant, and then told him that the folks had the small-pox in the house, and he said they should let the smoke out in the yard and not through the house. She also testified that Mrs. Meiner, another tenant, who occupied rooms under Deyoe, called the defendant's attention to the fact that the people up stairs were letting the water run through the ceiling, and asked him why he let the small-pox water run through.

This is some evidence of notice to the defendant, before the letting of the rooms to the plaintiff, that they were infected. The defendant, in his testimony, denied the knowledge and information imputed to him, and the conversations testified to by the plaintiff's witnesses, and stated that the coroner told him the Deyoe child died of croup, but these were matters for the jury.

On the whole we think that the evidence was sufficient to carry the case to the jury, and that the judgment must be affirmed, with costs.

All concur.

Judgment affirmed.

HALE v. PATTON, appellant.

(60 N. Y. 233.)

*Payment — where to be made — debtor not required to follow creditor out of State—
Condition in mortgage.*

Where the payee of a money obligation specifying no place of payment, is out of the State when payment is to be made, the debtor is not obliged to follow him, but readiness within the State will be as effectual as actual payment to save a forfeiture. A mortgage was conditioned to be due and payable, should any installment of interest remain unpaid for thirty days. Eight days after an installment of interest became due the mortgagee, who was a single man residing in the house of his mother, left the State and remained absent during the residue of the thirty days. *Held*, that the mortgagor was not required to tender the interest at the house of the mother in the absence of notice that she was authorized to receive it, and that there was no forfeiture.

ACTION to foreclose a mortgage executed by Patton to plaintiff to secure the payment of \$4,000, with interest payable semi-annually upon the first of January and July. There was a condition that in case any installment of the interest money should remain due and unpaid for thirty days, the whole principal sum should, at the option of the obligee, become due and payable.

The interest due January 1st, 1873, was not paid. The plaintiff was at his home in Troy, where both he and the mortgagor resided, until the 8th of that month, when he left the State and was absent therefrom until the December following. He was unmarried and resided in the house of his mother in Troy.

The court found that at the time plaintiff left the State and during the whole month thereafter, Patton, the mortgagor, had the money and was ready and willing to pay the interest; that about January 15th he went, with the money, to the residence of the plaintiff's mother for the purpose of paying said interest to her if she had the authority to receive it, but was informed by the servant at the door that the mother was too sick to be seen or to do any business. On the 3d day of February, 1873, Patton offered to pay said interest to one of the attorneys for the plaintiff in this action, who declined to receive it, because he was not then authorized to do so. The interest due was paid into court by Patton.

The court found the whole amount of principal and interest to be due and directed the usual judgment of foreclosure, which was entered accordingly. This judgment was affirmed by the General Term, and defendant appealed.

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E. F. Bullard, for appellant. Defendant was not bound to follow plaintiff out of the State to pay the interest. 2 Cow. Treat. 802, ed. 1841; 2 Penn. 71; Bac. Abr., Tender, C.; 2 Chit. Pl. 431, 433, 498; *Hills v. Place*, 48 N. Y. 520, 523; *Taylor v. Snyder*, 3 Den. 145; 52 N. Y. 573; *Meserole v. Archer*, 3 Bosw. 376; 1 Harr. Dig. 1858; *Eaton v. Lyon*, 3 Ves. Jr. 692. Defendant was entitled to proof of authority before paying to an agent. *Tuttle v. Gladding*, 2 E. D. S. 157; *Monnot v. Ibert*, 33 Barb. 26; *Thurber v. Corbin*, 51 id. 215. Defendant's visit to the residence of plaintiff's mother with the money was a good tender in equity. *Hills v. Place*, 48 N. Y. 523; *Scott v. Stevenson*, 2 Hill, 328; *Manning v. Burges*, 1 Ch. Cas. 29; *Perkins v. Beach*, 4 Cranch, 68; *Howard v. Holbrook*, 9 Bos. 241; *Hargous v. Lahens*, 3 Sandf. 213, 218; *Judd v. Ensign*, 6 Barb. 263; *Bingham v. Allport*, 1 Nev. & M. 398; *Morton v. Wells*, 1 Tyler, 381; *Kendal v. Talbot*, 1 A. K. Marsh. 321; *Strong v. Blake*, 46 Barb. 228; *Smith v. Smith*, 25 Wend. 405.

Martin I. Townsend, for respondent. Plaintiff's absence from the State did not relieve defendant from the necessity of tendering the money. *Smith v. Smith*, 25 Wend. 406; 2 Co. Litt. 55, § 304; 1 Ch. Cas. 29; 6 Bac. 450, tit. Tender; 2 Hill, 351; 2 Cow. Treat., ed. 1841, p. 802; *Judd v. Ensign*, 6 Barb. 258; *Morton v. Wells*, 1 Tyler, 381; *Kendal v. Talbot*, 1 A. K. Marsh. 321; *Johnson v. Hart*, 3 Johns. Cas. in Er. 329.

ANDREWS, J. The default in the payment of interest due January 1, 1873, did not accelerate the time of payment of the principal sum due on the mortgage, unless it continued for thirty days thereafter. The defendant, by payment of the interest due at any time within that period, would be entitled to the benefit of the contract in respect to the credit given for the payment of the mortgage debt.

The payment of the interest due within the specified time was the only circumstance which, by the terms of the mortgage, would prevent the condition from attaching and the whole debt from becoming presently due. But the performance or a condition of a bond or other obligation is excused by the default of the obligee, or his absence, when his presence is necessary for the performance, or when by his act or omission it can be said that he prevented performance. Com. Dig., "Condition," L., 4, 5, 6; *Bryant v. Beattie*, 4 Bing. (N. C.) 254, 268.

In general a debtor, who is indebted on a money obligation, is bound, if no place of payment is specified in the contract, to seek the creditor and make payment to him personally. But this rule is subject to the

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exception that if the creditor is out of the State when payment is to be made, the debtor is not obliged to follow him, but readiness to pay within the State in that case will be as effectual as actual payment to save a forfeiture. Co. Litt. 304, 2; *Smith v. Smith*, 25 Wend. 405; *Allshouse v. Ramsay*, 6 Whart. 331; *Southworth v. Smith*, 7 Cush. 391; *Tasker v. Bartlett*, 5 id. 359. The judge before whom the case was tried found that the plaintiff was absent from the State from the 8th of January, 1873, and that the defendant, during the whole of that month, had the money and was ready and willing to pay the interest. This, within the general rule, excused the defendant from actual performance of the condition. He had the whole month in which to make the payment to save the forfeiture. There is, however, the additional finding that the plaintiff had a residence in Troy during the whole time, and the proof shows that he was an officer in the army, and unmarried, and made it his home at the residence of his mother in that city, where it had been from his childhood. It is also found that in January, after the plaintiff left the State, the defendant went to the residence of the plaintiff's mother for the purpose of paying the interest to her, if she had authority to receive it, but was informed by the servant at the door that the mother was sick and unable to be seen, or to do any business. The defendant did not make his business known, but left on receiving information of the mother's illness. It is claimed by the counsel for the plaintiff, that, although a creditor is absent from the State when a payment is due, if he has a house therein where he resides, it is the duty of the debtor to tender the money there, or otherwise his obligation is not discharged. How this may be, as a general rule, we do not now decide, but we think that no such duty rested upon the defendant in this case. Payment or tender to be valid must be made to the creditor, or to some person duly authorized to receive it, or to one who, although he may have no actual authority, has an apparent authority to act for the principal. Bouv. L. Dic., tit. "Tender;" 2 Pars. on Cont. 615; *Bingham v. Allport*, 1 N. & M. 398; *Kirton v. Braithwaite*, 1 M. & W. 310. It does not appear whether any person was authorized by the plaintiff to receive the interest. It was shown that no written authority had been given. Payment to one authorized by parol to receive it would doubtless be good, but the debtor was not bound to part with his money to a third person without satisfactory evidence of his authority. Neither the mother nor any person at the mother's residence had any apparent authority to receive the interest. It was not the son's house, and the persons there were not his servants or agents. If the plaintiff desired that the money should be paid to his mother, he should have notified the defendant that she was authorized to

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receive it, and having left the State without doing so, the defendant was not obliged to tender the money at her residence.

The case of *Tasker v. Bartlett* supports this conclusion. The judgment should be reversed, with costs to abide the event.

All concur; MILLER, J., not sitting.

Judgment reversed.

BOOTH v. EIGHMIE, appellant.

(60 N. Y. 238.)

Statute of Frauds — promise to answer for the debt of another.

Land was conveyed by C. to plaintiff as security for a debt. He reconveyed to C. upon the pledge to him by defendant of certain railroad bonds, which defendant promised to redeem at par within a year. Held, that defendant's promise was original and not collateral; and that on his failure to redeem, plaintiff might foreclose and sell the bonds and hold him personally liable for any deficiency.

ACTION to foreclose defendant's equity of redemption in certain railroad bonds.

The court found these facts. In January, 1869, plaintiff held a deed of certain lands executed to him by Sarah A. Collins, which, though absolute on its face, was intended as security for a debt of about \$9,000 due from Mrs. Collins to plaintiff. Mrs. Collins, being desirous of procuring a reconveyance of the lands to herself, applied to defendant for a loan, and thereupon an agreement was made between the parties whereby the plaintiff reconveyed the land to Mrs. Collins upon the defendant's depositing with him certain first mortgage bonds of the Dutchess and Columbia Railroad Company, amounting at par to about the amount of the debt, and upon defendant's agreeing to redeem said bonds at par within one year. Defendant failed to redeem the bonds as agreed.

The court held that plaintiff was entitled to the relief demanded in the complaint, i. e., a sale of the bonds and a judgment against defendant for any deficiency. Judgment was entered accordingly, which was affirmed at General Term (3 N. Y. Sup. 878), and defendant appealed.

W. F. Cogswell, for appellant.

Edward Harris, for respondent.

MILLER, J. By the Statute of Frauds, any promise to answer for the

debt, default or miscarriage of another is void, unless the same be in writing and subscribed by the party to be charged therewith. 2 R. S. 136, § 2.

One Mrs. Collins was a debtor to the plaintiff, the debt being secured by a deed of certain real estate absolute upon its face, but actually intended as a mortgage. Mrs. Collins, being desirous of paying said indebtedness, and obtaining a conveyance of the land, at the request of the defendant, the plaintiff conveyed the land to Mrs. Collins, in consideration of which the defendant deposited and delivered, in pledge to secure the indebtedness, certain railroad bonds, which he agreed, within one year thereafter, to redeem at par, by paying the principal and interest which they represented.

The question to be determined is, whether the promise of the defendant was void by the Statute of Frauds. The authorities upon the subject are numerous, but the later decisions have, to a great extent, established certain general rules which are in most cases applicable and controlling. The test to be applied under the statute in every case is, whether the party sought to be charged is the principal debtor primarily liable, or whether he is only liable in case of the default of a third person; in other words, whether he is the debtor, or whether his relation to the creditor is that of surety to him for the performance, by some other person, of the obligation of the latter to the creditor. *Brown v. Weber*, 38 N. Y. 187. There is, I think, no sufficient ground for claiming that the promise of the defendant was given or accepted as collateral to the demand which the plaintiff held against Mrs. Collins, or in default of her paying the same. There was no such condition made in the agreement, and it is not to be inferred from the facts presented. It was not a promise to become liable as surety for the debt of another, or collateral to the original indebtedness. That indebtedness had been fully discharged by the conveyance of the land by the plaintiff to Mrs. Collins, and it is in no way apparent, nor can it be properly assumed that the plaintiff could enforce his claim against her. The test is, whether the plaintiff could have maintained an action against her for the demand which was paid by a conveyance of the land and acceptance of the bonds. No such element entered into the agreement, either upon the execution of the conveyance or the delivery of the bonds; nor is it to be presumed from the circumstances surrounding the case. An action brought for such a purpose would be without any evidence to support it, and must inevitably fail. The plaintiff had entirely relinquished his claim upon the land, as well as against the original debtor, and the defendant entered into an independent obligation to secure or pay the debt. The case was not that of a creditor

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who releases a security without extinguishing the debt, but was a relinquishment of the debt against the debtor without having and without reserving any right whatever to pursue a remedy against the debtor.

In my opinion there is no valid ground for claiming that there was no sufficient consideration to support the promise. By the conveyance of the lands to Mrs. Collins the plaintiff gave up a security on real estate which, we are authorized to assume, was ample, and took defendant's promise with the bonds, the market-value of which was fifteen per cent. below par. He also released the debtor from personal liability, and without the benefit of the defendant's promise, he no doubt would have been subjected to loss upon the sale of the bonds. Here was an injury to follow by reason of a failure to fulfill the promise, and the defendant also was benefited by obtaining a lien upon the lands conveyed to Mrs. Collins, by means of security taken, and a mortgage which she executed to him, as well as by a right to develop these lands. 2 Pars. on Cont. (5th ed.) 7.

The case of *Mallory v. Gillett*, 21 N. Y. 412, is cited by the counsel on both sides, and I do not discover any doctrine laid down, or principle asserted, which conflicts with the rules already referred to as bearing upon cases of this character. In that case the plaintiff had possession of a canal boat, upon which he had a lien for repairs, and delivered it to a third person, at the defendant's request, upon his verbal promise that he would pay the amount due for such repairs, and it was held, there being no consideration moving to the defendant, that his promise was void under the Statute of Frauds. There is a marked distinction between the case cited and the one at bar. In the case cited, the plaintiff never relinquished or extinguished his claim against the original owner for the repairs, while here it was completely surrendered. Besides, there was no valid consideration for the promise, and it was collateral to the original debt, which was still in force, and for the collection of which there was an adequate and an ample remedy. It is said, in the prevailing opinion in this case, that among the cases which are not held to be within the statute, are those "where the original debt becomes extinguished, and the creditor has only the new promise to rely upon." The case at bar may, I think, be considered as embraced within this rule, as we have seen that the plaintiff could only rely upon the agreement made with the defendant to obtain payment of her entire demand.

The judgment must be affirmed, with costs.

All concur; except ALLEN and FOLGER, JJ., dissenting; CHURCH, Ch. J., not sitting.

Judgment affirmed.

 Anonymous.

ANONYMOUS.

(60 N.Y. 262.)

Slander — female chastity — special damages.

Words charging a female with self-pollution are not actionable *per se*.

In an action for slander in charging the plaintiff with self-pollution it was alleged, as special damage, that the father of the plaintiff, with whom she lived and upon whom she was dependent, had, by reason of the charge, withheld from plaintiff a dress and a course of lessons in music which prior to the charge he had promised her. The father testified that he did not believe the charge. *Held*, that such damages would not maintain the action.

ACTION of slander. The words proved charged the plaintiff with having committed the act of self-pollution. The referee found the speaking of the alleged slanderous words by defendant; that plaintiff, at the time, was eighteen years of age, residing with her father; and that, within one month prior to the speaking of the words, plaintiff's father had promised her a silk dress, and a course of music lessons on the piano, and, after having heard of the statements of defendant, and in consequence thereof, he refused to perform his promise. Also, that the father did not believe that the charge was true, but believed it would injure her in the estimation of others. As conclusion of law, he found that the defamatory words were not actionable *per se*, and that no such special damage was shown as would sustain the action. Judgment was entered for defendant which was affirmed by the General Term, and plaintiff appealed.

R. Hood and Beale & Benton, for appellant. The words uttered by plaintiff concerning the defendant were defamatory and actionable *per se*. 1 Hill on Torts, 228, 240; 4 Mason, 115, 116; 1 Kent's Com. (10th ed.) 631; 1 Am. L. Cas. 103, 111; 2 E. D. S. 388; *Young v. Miller*, 3 Hill, 23; *Terwilliger v. Wands*, 17 N. Y. 61; *Bradt v. Towlsy*, 13 Wend. 253; *Fuller v. Fenner*, 16 Barb. 333; 22 id. 396; 3 Blacks. 123; Guy's Med. Jur. 58, 59; Comyn's Dig. 384, 385; *Miller v. People*, 5 Barb. 203, 204; *Van Akin v. Caler*, 48 id. 58; Gen. Ch. 38, 7-10; Lev. Ch. 15, 16, 18. The allegation and proof of special damage was sufficient to enable plaintiff to maintain this action. 1 Hill on Torts, 241; 1 Am. L. Cas. 103, 105; 1 Stark. on Slander, 195, 202; 1 Taunt. 39; 8 id. 130; 2 Hill, 309; 3 id. 22; 1 Wend. 506; 3 id. 291-296; 19 id. 305; 20 id. 225; 3 Den. 346, 352; 8 C. & P. 234; 8 Harr. 112; 17 N. Y. 54, 64; 48 id. 561, 568; 13 Wend. 255, 256; 5 Cow. 351; 17 N. Y. 54; 48 id. 561; 11 Paige, 185.

Anonymous.

R. E. Andrews, for respondent.

GROVER, J. The words charged are not actionable *per se*. To make them such it is not enough that the charge thereby imputed was one involving turpitude in a moral sense, but it must constitute an indictable offense, upon conviction of which punishment may be inflicted. *Young v. Miller*, 3 Hill, 21; *Crawford v. Wilson*, 4 Barb. 504. The charge in the present case, if true, would not subject the plaintiff to an indictment for any criminal offense. In this I exclude any idea that an indecent public exposure of the person was included in the charge made by the defendant. There was no evidence tending to show this.

The only question is, whether the special damage alleged and proved was sufficient to maintain the action. The case shows that the plaintiff was a minor, about eighteen years old, residing with her father, by whom she was provided for and maintained; that prior to his having heard of the charge made against the plaintiff by the defendant, he had promised to give her a course of music lessons upon a piano and a silk dress, both of which he refused to do after hearing that the defendant had made the charge, until it was cleared up. He testified that he wholly disbelieved in its truth. Damage, to sustain the action, must be the natural and immediate consequence of speaking the words. *Terwilliger v. Wands*, 17 N. Y. 57. A father is bound by law to support and educate his minor child. The mode and state of the maintenance furnished, and the kind and extent of education given, is necessarily largely left to his discretion. This case it will be seen does not present the question whether a malicious slanderer of the child, who imposes upon the parent a false belief that it is guilty of vicious conduct, and thereby influences the exercise of this discretion less favorable to the child than the parent otherwise would have done, is liable to an action — in other words, whether, by such means so influencing paternal discretion, constitutes special damage to the child. In this case the father testified, in substance, that he believed the charge entirely false and groundless. It is obvious that so far from being natural, it would be highly unnatural for a parent to withhold any favor or kindness from his child on account of a falsehood reported about it. On the contrary, the tendency would naturally and legitimately be to induce more kindness and greater indulgence. Indeed, I do not think special damage can be predicated upon the act of any one who wholly disbelieves the truth of the story. It is inducing acts injurious to the plaintiff, caused by a belief of the truth of the charge made by the defendant, that constitutes the damage which the law redresses.

I have reluctantly come to the conclusion, in the present case, that the

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damage alleged and proved was not such as to maintain the action, for the reason that the charge preferred was against a young female, and of a nature greatly to distress her and very much annoy her friends, and one made up by the defendant, without any foundation whatever in truth, as I think any one must be satisfied from the testimony of the witness to whom the defendant first told the story. The defendant deserves punishment, but the action of slander will not afford a remedy.

The judgment appealed from must be affirmed.

All concur; MILLER, J., not sitting.

Judgment affirmed.

 PARDEE v. FISH, appellant.

(60 N. Y. 265.)

Negotiable instruments—certificates of deposit—liability of indorser.

A certificate of deposit in the usual form, payable to the depositor's order, is negotiable, and the indorser thereof is liable as upon a note.

A certificate of deposit or note payable "in current bank notes" is negotiable.*

A certificate of deposit payable with interest to the depositor's order is a continuing security as between indorsee and indorser, and the latter is liable thereon until an actual demand is made, and the holder is not chargeable with neglect because the demand is not made at any particular time.

ACTION upon the indorsement by defendant of a certificate of deposit issued by the People's Safe Deposit Company of New York.

In March, 1872, defendant deposited \$600 with said company and received therefor a certificate of deposit payable to his order in current bank notes with interest. On the 5th of June defendant indorsed the certificate to plaintiff, who presented it to the company and demanded payment, December 24, 1872. Payment was refused, the company having been adjudged a bankrupt on the 12th of September preceding. The certificate was duly protested and notice thereof given defendant.

The court, upon trial, found that plaintiff was guilty of *laches* in demanding payment, but ordered judgment in favor of the plaintiff, which was affirmed at General Term. Defendant appealed.

Lyman & James, for appellant. The certificate was not commer-

* See to same effect *Huse v. Hamblin*, 28 Iowa, 501; 4 Am. Rep. 244.

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cial paper, and defendant's indorsement operated only as an assignment. *Hotchkiss v. Mosher*, 48 N. Y. 482; *Payne v. Gardiner*, 29 id. 171; *Patterson v. Poindexter*, 6 W. & S. 227; approved, 8 W. & S. 361. The certificate was not negotiable because made payable in current bank notes instead of money. Byles on Bills, 92, 146; *Hasbrook v. Palmer*, 2 McL. 10; *Fry v. Rousseau*, 3 id. 106; *Kirkpatrick v. McCullough*, 3 Humph. 171; *Collins v. Lincoln*, 11 Vt. 268; *Whiteman v. Childress*, 6 Humph. 303; *Sweetland v. Creigh*, 15 Ohio, 118; *Besancan v. Shirley*, 9 S. & M. 457; *Cockrill v. Kirkpatrick*, 9 Mo. 697; *White v. Richmond*, 16 Ohio, 5; Story on Prom. Notes (6th ed.), § 18; Edw. on Bills, 135, 136; *Bunker v. Athearn*, 35 Me. 365; Chitty on Bills, 58, 152, ed. 1836. 10 S. & R. 94; 14 Pet. 299; 11 Iowa, 85, 172; 24 Ill. 168; 14 Mass. 322; 44 Penn. 454; 9 Ind. 172; *Thompson v. Sloan*, 23 Wend. 71; *Lieber v. Goodrich*, 5 Cow. 186; 3 Kent's Com. 35, 36; *Carrer v. Lockwood*, 11 Alb. L. J. 208, No. 7. A demand was necessary before the action could be brought. *Downs v. Phœnix Bank*, 6 Hill, 297

George Barrow, for respondent.

MILLER, J. The questions presented upon this appeal are not free from embarrassment, which mainly arises from a want of harmony in the adjudications which relate to and have a bearing upon the principle involved.

The instrument upon which the action is brought was a certificate of a savings bank, to the effect that the defendant had deposited a certain sum payable to the order of himself in current bank notes on the return of the certificate with interest and indorsed by the defendant. It is conceded that, unless the instrument was in the nature of commercial paper negotiable by indorsement, the plaintiff could not maintain the action against the indorser. This question should be primarily considered. It is laid down in Parsons on Bills, vol. 1, p. 26, that a certificate of deposit in the usual form possesses all the requisites of a negotiable promissory note, and that such is the prevailing opinion. Numerous cases are cited, mainly from other States, to sustain this doctrine. In *Miller v. Austen*, 13 How. (U. S.) 218, 228, this very question was distinctly presented, and the same principle was upheld. CATRON, J., who delivered the opinion of the court, says: "The established doctrine is that a promise to deliver or to be accountable for so much money is a good bill or note."

* * * "Every reason exists why the indorser of this paper should be held responsible to his indorsee that can prevail in cases where the paper indorsed is in the ordinary form of a promissory note, and as such note

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promissory note, but the same principle is applicable here as in that case, and cannot be overruled.

The judge has found that the plaintiff, having kept and retained the certificate from June 8, 1872, until December 24, 1872, before having presented it for payment, was guilty of *laches*. Within the rule laid down in *Merritt v. Todd*, it was a continuing security as between indorsee and indorser; and the latter was liable until an actual demand was made, and the holder cannot be chargeable with neglect because the demand was not made within any specified time. If, for any reason, a different rule should be deemed appropriate, it is by no means clear upon the facts that the time was unreasonable under the circumstances existing. The bank was adjudged a bankrupt on the 12th of September, a little over two months after the instrument passed into the plaintiff's hands; and as nothing would be gained to the defendant by a presentment immediately afterward, no injury could have accrued, and therefore there was no such *laches* as would prevent a recovery.

The defendant also claims that if the certificate is held to be a promissory note it is void under the constitution (art. 8, § 4), and section 14 of the charter of the bank (Chap. 816, S. L. of 1868), which provides that said corporation shall possess the general powers and be subject to the liabilities and restrictions of the Revised Statutes (2 R. S. [5th ed.] § 4, 596), which exacts that "no corporation, not expressly incorporated for banking purposes, shall, by implication or construction, be deemed to possess the power of discounting bills," etc. The answer to this position is, I think, that the bank had authority, under its charter (§ 5), to receive money and give a certificate for the same at any rate of interest not exceeding that allowed by law. This was all that the bank did. The certificate was not issued for a loan or for circulation as money, but, as appears on its face, and as the proof showed, for money which had been deposited. It belonged to the defendant when delivered, and was subject to his order, without any authority of the bank to control it. The right of the bank to make such a certificate, for money actually deposited, is clearly distinguishable from cases where they are issued for other purposes in violation of law, as in 2 Hill, 241 and 295.

The judgment was right, and must be affirmed.

All concur.

Judgment affirmed.

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FIRST NATIONAL BANK OF LYONS V. OCEAN NATIONAL BANK.
appellant.

(60 N. Y. 278.)

National bank — liability for deposits for safe-keeping — ultra vires.

The cashier or other executive officer of a national bank has not, in the absence of special authority from the directors or of a usage or practice so to do, power to receive on behalf of the bank, property for safe-keeping.

Quere as to the power of a national bank to become a bailee of property either gratuitously or for hire.

A gratuitous bailee is only liable for gross negligence; he is not bound to any special or extraordinary measures to protect the property, and the negligence with which he can be charged, or which is the proper subject of evidence, is only that which is connected with and directly contributes to the loss.

In an action against a bank for the loss of property which it had received as gratuitous bailee, *held*, that the declaration and admissions of the president, tending to show negligence on his part, made after the transaction, and when not acting within the limit of his authority, were not binding upon the bank. (*See note, p. 192.*)

ACTION to recover the value of United States bonds delivered by plaintiff to defendant for safe-keeping, and alleged to have been lost through the defendant's negligence.

Both the plaintiff and the defendant were banking corporations, organized under the act of Congress of 1864 (13 U. S. Stat, at Large, 39), the plaintiff being located in Lyons, Iowa, and the defendant in the city of New York.

The plaintiff's evidence tended to show that it became a depositor with defendant in consequence of a circular signed by the defendant's cashier, soliciting the accounts of the banks to which it was sent, offering to allow four per cent interest on daily balances, to pass cash items to the credit of the correspondent on day of receipt, without charge, and to buy and sell government bonds, gold and stocks, without charge. The bonds in question were received and receipted for, part by defendant's cashier and part by its assistant cashier, as held subject to plaintiff's order. A portion of them were purchased by defendant for plaintiff. Letters from defendant's cashier showed that on three occasions the coupons were, by plaintiff's directions, cut from the bonds and the proceeds credited to plaintiff's account. No charge was made against plaintiff for purchasing the bonds or collecting the coupons. Defendant's banking-house and vault was broken open by burglars, and the bonds, with a large amount of other securities and money belonging to defendant, stolen.

The further facts appear sufficiently in the opinion.

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Judgment was entered on a verdict in favor of the plaintiff, which was affirmed at General Term in the Common Pleas of New York city. Defendant appealed.

F. N. Bangs, for appellant.

Lucien Birdseye, for respondent.

ALLEN, J. The point was distinctly made at the close of the plaintiff's evidence, and renewed at the close of the trial, that there was no evidence that the corporation defendant had made any contract of bailment with the plaintiff, or assumed any obligation as bailee of the plaintiff's property and that there was no evidence that the officers of the corporation had power or authority to make, in behalf of the corporation, any contract of bailment, or assume any liability as a custodian and bailee of the securities of the plaintiff under the circumstances. This is entirely distinct from the very serious question back of it, and to be met, if this position of the counsel for the defendant is not well taken, that the defendant had not power or authority to assume the duties and obligations of a naked bailee of property, whether gratuitously or for hire, and that the contract of bailment, if one was made by or in behalf of the corporation, was *ultra vires*, and imposed no legal obligation upon the corporation as such. Or, if the power to become the bailees or depositaries of property for safe-keeping be conceded, a question may arise as to the contract implied, and the extent of the obligation assumed by the mere receipt of, and placing the property in the vaults of the bank in the absence of a special contract, in view of the special purposes for which the corporation was created, and the limited powers expressly conferred.

The bonds in question were the absolute property of the plaintiff. The defendant had no special property in them. It had no lien upon them, and they were not deposited or held as a security for or in connection with the business of the defendant as a banking corporation, or its transactions with the plaintiff, either present or prospective. If a bailment to the defendant, it was a simple deposit without interest in, or compensation to, the depositary. It was a naked bailment of property to be kept for the bailor without recompense, and to be returned when the bailor should require it. This is the legal definition of a deposit of this character. Story on Bailments, § 4.

The relation of bailor and bailee imports a trust, and a contract, express or implied, to re-deliver the property when the purposes of the

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trust shall be accomplished, and the contract is supported, in the case of a naked bailment and simple deposit, by the yielding up of the present possession or custody by the bailor, upon the faith of the engagement of the bailee to re-deliver. Story on Bailment, § 2 and note 4, and cases cited. The duties and obligations of a bailee cannot be thrust upon one against his consent, but must be voluntarily assumed by the party himself, or some authorized agent, as in every obligation founded upon contract, express or implied. A corporation can only act by agents, and it follows that it cannot be subjected to the responsibilities and liabilities of a bailee, except by the acts and contracts of its agents duly authorized, or by agents acting within the scope of their general powers and apparent authority under circumstances which would estop the corporation from denying that their real was not co-extensive with their apparent authority, or that they were not authorized to exercise the powers usually delegated to like officers and agents in other corporations of the same character. There is an entire absence of evidence that it was the habit and practice of the defendant to receive special deposits and valuable property or securities for safe-keeping, or that they had done it for any other person or corporation, except in the case of O'Kell, a tenant, occupying a part of the same building, as its lessee. It would seem that he had been in the habit of depositing a small trunk, used in his daily business, in the vault of the defendant for safe-keeping over night. It was not proved that the directors or any one of them had ever sanctioned the receipt of special deposits of any kind for safe-keeping, or that they had any knowledge of the deposit of these securities, or of any other like deposit. If it be assumed that the circular issued by the officers of the defendant, inviting the correspondence of other banks, was known to or authorized by the directors, it presented no evidence of a consent to become a general bailee and depositary for their correspondents. A proffer to buy and sell securities comes far short of an undertaking to act as a depositary of them, for an indefinite time, or for any time beyond that necessary to accomplish the precise agency assumed. It is one thing to act as an agent in the purchase and sale of property, and quite another and a different thing to receive it on deposit, and assume the responsibilities of a bailee. The case is also barren of evidence that other banks were in the habit of receiving deposits of a like character and under like circumstances. There was no attempt to prove a general custom or usage upon the subject, even if that could have affected the liability of the defendant, or been given in evidence as tending to prove the authority of the bank officers in the premises.

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porated pursuant to the act of Congress entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, known as the "National Currency Act," and the officers and agents of each must be assumed to be familiar with the powers of the other, and the general powers and duties of its officers. The governing body of national banks is the board of directors, authorized by section 9 of the act, and such board has the management and control of the affairs of the corporation, and may do and transact any and all business within the limits of the powers conferred by the act of Congress. To the extent of the powers given by the act the directors may bind the corporation, and the shareholders, who are the constituent body; and the shareholders are, by section 12, made personally responsible "for all contracts, debts and engagements" of the association, to the extent of the amount of their stock therein, in addition to the amount invested in such shares. This responsibility is necessarily limited to such contracts, debts and engagements as may lawfully be made or incurred in the exercise of the corporate powers as limited and prescribed by the act of Congress. The managing officers of corporations formed under the act, those who transact the current business of the association, are appointed by the corporation, which has power to appoint them and define their duties. They are a president, vice-president, and a cashier, and such other officers as may be found necessary, but by whatever name known they only possess such powers as are delegated by the governing body, or the corporation, either in terms or by implication. Act, *supra*, § 8. There is no evidence that the powers and duties of the managing officers of the defendant were specifically defined by any act or resolution of the corporation or the board of directors. It must be assumed, therefore, and the public and those dealing or having business transactions with the bank had the right to assume, that they had and exercised the powers and performed the duties usually devolved upon and performed by persons occupying the same position in other banks, and such as they were in the habit of performing in the transaction of the current and ordinary business of the bank, and within this limit the corporation would be bound by their acts in the absence of proof that their powers were limited or restricted, and that such restriction and limitation was known to the person dealing with them. Story on Agency, § 114, and cases cited in notes. Whatever may be the extraordinary or incidental powers of the corporation under its charter, power to bind the corporation can only be presumed to exist in its executive agents and officers within the scope of its ordinary business and their ordinary duties. *Life and Fire Ins. Co. v. Mech. Fire Ins*

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Co., 7 Wend. 31; *Minor v. Mech. Bank of Alexandria*, 1 Pet. 46
Hoyt v. Thompson, 1 Seld. 320; *Leggett v. N. Y. Manf. Co.*, Sandf. Ch.
 541.

The powers of the corporation defendant are banking powers only, with such incidental powers as may be necessary to carry on the business of banking, with the privilege of buying and selling exchange, coin and bullion. This does not necessarily include the business of a safe deposit company, or business of receiving for safe-keeping, and storing for hire, or without compensation, jewelry and valuables, or property of any kind. If the power exists in the corporation as a part of its franchise, it is only as an incident of its principal business. The duties of the executive officer of a banking corporation, who is ordinarily the cashier, are very well understood, and while those of the president are not so well defined, he is but the executive agent of the board of directors, to perform such duties as may be devolved upon him, and is not the corporation, and cannot take the place of the governing board, and make contracts or incur liabilities outside of the ordinary business of the bank, without special authority. The corporations formed under the Currency Act are banks of deposit as well as circulation. They are authorized to issue their own notes for circulation, and to receive from others their money and circulate it. Money so received from others is termed a deposit, although it has none of the qualifications of a bailment. There is no trust or promise to re-deliver the same money. By the deposit the money becomes the property of the bank, and the relation of debtor and creditor is created between the depositor and the bank. *Commercial Bank of Albany v. Hughes*, 17 Wend. 94; *Marine Bank v. Fulton Bank*, 2 Wall. 252. This is the character of the deposit which, by the Currency Act, the defendant was expressly authorized to receive, and in receiving such a deposit the cashier would be acting within the scope of his authority, and the bank, by his act, would become a debtor to the depositor.

The principal attributes of a bank are, the right to issue circulating notes, discount commercial paper, and receive deposits of money. Per SPENCER, J., 15 Johns. 390: *N. Y. Firemen's Ins. Co. v. Ely*, 2 Cow. 678, 710.

The act of Congress under which the plaintiff and defendant became incorporated makes them banking corporations, and confers upon them banking powers, and all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; by obtaining, issuing, and circu-

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lating notes, according to the provisions of the act. The statutory powers and franchise are entirely coincident with the attributes of banking corporations as defined by the law-merchant. The national banking associations are required, by law, to have on hand, at all times, lawful money to a prescribed amount as a reserve fund; and are permitted to "keep one-half of the lawful money reserve in cash deposits" in the city of New York, but the bonds in controversy were not, and could not have been, deposited with or received by the defendant under this provision of law. Act, *supra*, §§ 31, 32.

The deposit of these bonds cannot be distinguished from a deposit of jewelry or plate, or other valuable property, and was a special transaction, not within the ordinary course and business of banking, or necessarily incident to it. If authorized, it added greatly to the risk of loss to the shareholders, without adding to their gains. It was a holding out of greater inducements to burglars and robbers from without, and might prove of greater temptation to dishonesty, on the part of clerks and employees, within the bank. As a business, it could not have been undertaken at the risk and responsibility of the corporation by the executive officers, or without the special authority of the board of directors, and a single transaction was without the general scope of the powers and duties of the executive officers of the institution.

Giblin v. McMullen, L. R., 2 P. C. Cases, 327, was an appeal from the Supreme Court of Victoria. The defendant represented the Union Bank of Australia, and no question was made as to the authority of the manager of the bank to receive the special deposit; and it is expressly said that the railway debentures, which were stolen by the cashier, were placed in the defendant's care by a customer, in the ordinary course of their business as bankers. The case turned upon the liability of the bailee for a theft by the officers of the bank, and the court, following *Foster v. Essex Bank*, 17 Mass. 479, held the defendant not liable. *Foster v. Essex Bank* was a special deposit of coin, and the bank was held to be the depositary, rather than the cashier or other officers, although not held liable in the action, on the ground of a general recognition and authorization of the practice by the directors; and PARKER, C. J., places the responsibility of the defendant solely on that ground; and applying the principles of master and servant, and deducing the relation of bailor and bailee, says: "Not so. if the servant secretly, and without the knowledge, express or implied, of the master, he not having authorized or submitted to the practice, receives the goods for such purpose, for no man can be made the bailee of another's property, without his consent; and there must be a contract, express or implied, to induce a liabil-

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ity. The knowledge and permission, expressly found or legally to be presumed in this case, establishes a contract between the parties."

Scott v. National Bank of Chester, 72 Penn. St. 471, followed the case last cited, in principle. A case very analogous to, if not in all respects like this in principle, was, *Lloyd v. West Branch Bank*, 15 Penn St. 172, and it was adjudged that the cashier had no authority to receive, as a special deposit, a sealed package of small notes, issued by a corporation, without authority of law, and that if so received, without the permission of the directors, or their knowledge of any usage or practice to receive such packages on deposit, the law would not imply a contract on the part of the corporation with the depositor for the safe-keeping of the package. COULTER, J., says, that "it was never designed by the provisions of the statute that the bank should be converted into a kind of pawnbroker shop." The case turned upon the point as expressed by the court, that there was "no evidence that the bank made any contract with Oliver (the depositor), express or implied." The whole tenor of authority is in favor of holding corporations for the acts of their officers, especially executive officers and general agents within the general scope and apparent sphere of their duties, and not holding them for acts done without special authority in cases without such general scope and sphere of duty. The cases are all reconcilable and sustainable on this principle and no other. Courts and judges have spoken cautiously on the subject, but the language has been uniform, limiting the responsibility of corporations for the acts of their officers and agents, in the absence of an express authority to do the particular act, to those performed in the discharge of their ordinary duties in the usual course of business, and within the sphere and scope of such duties. Such are presumed to be by authority of and within the knowledge of the directors; and within the rule are included such acts as are shown to have been performed with the knowledge and implied consent of the directors, although out of the line of ordinary duty and usual course of business. The duties of the cashier are well understood, and as recognized judicially are restricted to the care and management of the property and fiscal concerns of the bank, and the conduct of its business as a bank, in the usual and ordinary way. Story on Agency, §§ 114, 115; *Badger v. Bank of Cumberland*, 26 Me. 428; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Bank of Genesee v. Patchin Bank*, 3 Kern. 309. The president and cashier of a bank cannot assign the choses in action of the corporation to its creditors as a security for the payment of a precedent debt, without authority from the board of directors. They can do no act outside of their ordinary duties in the conduct and man-

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agement of the banking business, unless by authority, either express or implied from the fact that they have been permitted to do the like acts without objection. *Hoyt v. Thompson*, 1 Seld. 320. Judge WAYNE, in *United States v. City Bank of Columbus*, 21 How. (U. S.) 356, says: "The court defines the cashier of the bank to be an executive officer by whom its debts are received and paid, and its securities taken and transferred, and that his acts, to be binding upon a bank, must be done within the ordinary course of his duties. His ordinary duties are to keep all the funds of the bank, its notes, bills and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives, directly or through the subordinate officers of the bank, all the money and notes of the bank, delivers up all discounted notes and other securities when they have been paid, draws checks to withdraw the funds of the bank when they have been deposited, and, as the executive officer of the bank, transacts most of the business." After this summary of the duties and powers of the cashier, the same judge says that he may not make any contract involving the payment of money not loaned in the usual or customary way, or purchase or sell property, or create an agency of any kind for the bank unless expressly authorized by those to whom has been confided the power to manage the business of the bank, both ordinary and extraordinary. Judge STORY limits the authority of bank officers, to bind the corporation to acts and contracts within the ordinary sphere of their duties, and the scope of the ordinary business. *Minor v. Mech. Bank of Alexandria*, 1 Pet. 46, 70; *Fleckner v. Bank of United States*, 8 Wheat. 338; see also, *Fulton Bank v. New York and Sharon Canal Co.*, 4 Paige, 127. The doctrine of estoppel may give effect to the acts of the officers of a corporation as against the corporation, as in other cases of principal and agent. *Farmers and Mechanics' Bank v. Butchers and Drovers' Bank*, 16 N. Y. 125. But there is no question of estoppel in this case.

A class of cases were cited by the learned counsel for the plaintiff which do not very directly bear upon the question under consideration. They are those in which a statutory power has been conferred and has been executed, apparently within the terms and in the manner and by the agents prescribed by statute, and a presumption has been allowed in favor of the validity of the execution of the power in favor of those who have in good faith acted upon the apparent compliance with the statute and the terms of the grant. The cases are circumstantially different, but all may be brought within one general principle, and they do not conflict with the views before advanced. *Commissioners of Knox County v. Aspinwall*, 21 How. 539; *Royal British Bank v. Turquand*, 5 E. & B. 248; S. C., 6 id. 327; *Society for Savings v. City of New London*,

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29 Conn. 174; *Commonwealth v. Pittsburgh*, 34 Penn. St. 496; *Farmers' L. and T. Co. v. Curtis*, 3 Seld. 466, are among the cases cited by counsel, and illustrate the principles governing all. They do not touch the principle upon which this branch of the present appeal rests.

No general principle was decided in *Van Leuven v. First National Bank of Kingston*, 54 N. Y. 671. By a divided court it was held that the contract in that case, under the peculiar circumstances, was the contract of the corporation, and not the individual contract of the president. The question now under consideration was not considered by the learned commissioner, and does not appear to have been made in the action.

It was very earnestly and ably urged upon the court by the counsel for the plaintiff that the corporation was liable as a wrong-doer or *tortfeasor* within the principle of *Philadelphia, Washington and Baltimore Railroad Company v. Quigley*, 21 How. (U. S.) 202, and other cases which were cited, in which the doctrine was applied under different circumstances. The difficulty with this argument is, that there was no wrong by the corporation, and could be none, if there was no contract. If there was no bailment to the corporation it neglected no duty, and was guilty of no negligence. The whole duty of a bailee rests upon contract, and if there was no contract there was no duty. Neither a corporation nor individual can be called upon to pay that which he or it does not owe, and neither is responsible for want of care or for neglect in protecting property of which he or it has not assumed the custody, or any relation of duty or trust in respect to it.

Having arrived at the conclusion that if the power of the corporation to assume the position of bailee, with its responsibilities and obligations, be conceded, there was no evidence of the delegation of the power to the executive and ministerial officers of the bank, and that for that reason the judgment should be reversed and a new trial granted, it is unnecessary to consider the question back of it as to the power of the corporation itself in that direction. It is a question not free from difficulty, but can be more satisfactorily considered when it becomes (if it shall) necessary to a judgment.

The public are interested in restraining corporations to the enjoyment of the precise franchise granted, and the exercise of the powers expressly conferred, and the incidental powers essential to the express power. Shareholders are also interested in keeping their trustees, the governing boards, within the limits of the delegated power with which they are clothed. It is axiomatic that a corporation can make no contracts and do no acts except such as are authorized by its charter, either expressly or as incidental to its existence. Corporations necessarily depend, both for their powers and the mode of exercising them, upon the construction of

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the statute which gives them life and being. Whether the receipt of goods and securities on deposit for safe-keeping is within the powers, express or implied, of national banks, will not be considered. The case has been considered as one of gratuitous bailment, as that was the theory upon which it was tried. If any other relation existed between the parties in respect to the bonds than that of bailor and bailee without compensation, or any other obligation or liability rested upon the defendant other than that which would result from such relation, it must be developed on another trial.

Since writing the above the case of *Wiley v. First National Bank of Brattleboro*, recently decided by the Supreme Court of Vermont (see *ante*, p. 122) has come to my notice. That learned court held that the cashier of a national bank has no power to receive special deposits in behalf of the bank for the accommodation of the depositor, or to bind the bank to any liability on any express contract accompanying, or any implied contract arising out of such taking, and the judgment is sustained by a well considered opinion of Judge WHEELER. In his views I fully concur.

Several exceptions were taken at the trial to the admission and exclusion of evidence, some of which we think were well taken. The defendant was a gratuitous bailee, that is, a depositary without compensation for the benefit of the bailor, and was, therefore, only liable for gross negligence, which is defined in various ways. The term itself has been quarreled with, but it still has a place in the law, and must have, so long as the measure of liability implied by the term is recognized, and until some better term can be invented to give expression to it. It is incapable of precise definition, and its application and use may lead, in some cases, to results unsatisfactory; but that comes as directly from the nature and extent of the duty in the particular case, as from the phrase by which a breach of the duty is expressed. I cannot but think that, in this case, the defendant was held to a higher standard of obligation than the circumstances warranted, but the question is not before us. What constitutes gross negligence, that is, such want of care as would charge a gratuitous bailee for loss, must depend very much upon the circumstances to which the term is to be applied. It has been defined to be the want of that ordinary diligence and care which a usually prudent man takes of his own property of the like description. *Giblin v. McMullen*, *supra*. This definition is given by a reference to the degree of care, rather than the degree of negligence, which may be the easier and more intelligible mode of defining the extent of the obligation, and the measure of duty assumed. Ordinary care, as well as gross negligence, the one being in contrast with the other, must be graded by the nature and value of the property and the risks to which it is exposed. A depositor of goods or

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securities for safe-keeping with a gratuitous bailee can only claim that diligence which a person of common sense, not a specialist or expert in a particular department, should exercise in such department. Wharton on Negligence, § 470. The bank, as depositary, taking no pay and taking no risks, was not bound to resort to any special or extraordinary measures to protect the property of the depositor, and the negligence for which it could be charged, or which was the proper subject of evidence upon the trial, was only that which was connected with, and directly contributed to the loss. Independent acts of negligence, disconnected with the loss, were not properly admissible in evidence. *Scott v. National Bank of Chester Valley, supra.*

The defendant was not chargeable with negligence or want of care for not acting upon facts or circumstances not coming to the knowledge of its directors or officers. Facts not brought home to them, tending to show that the property was exposed to loss from some unusual cause, to some peril growing out of peculiar circumstances, were not admissible in evidence against the defendant. The bailee was only called upon to take such care as became necessary to protect it against risks known to it, or of which it had notice. There was great latitude in the evidence on the part of the plaintiffs, and some of it was quite dramatic in its character; the purpose and end was to show that the place of deposit was peculiarly, and extraordinarily exposed to perils from robbers at that time, calling for more than the usual cautions from the bailee. This was competent, so far as facts and circumstances proved to exist were communicated to the officers of the bank, but no farther. Without stopping to inquire whether all the evidence of this character was competent, or whether all the facts, which, if known, might have alarmed the officers of the bank, and stirred them up to greater diligence, were made known to them, I will refer to a single exception which is fatal to the recovery. The plaintiff was permitted to prove a conversation between one Holley and the president of the bank, immediately after the robbery, in which the president, Mr. Martin, was made to say, "For God's sake and mine, never make mention of any conversation that has ever passed between you and me, in relation to the robbery of this bank." Holley had testified to several prior conversations, in which he claimed to have made known to the president some attempt by burglars to enter the bank building, and of indications of an intended robbery, and urged upon him the necessity of greater precautions. The admission of the evidence which formed the subject of the exceptions is sought to be justified as the act of the defendant, by its authorized agent, to suppress testimony, to conceal and cover up evidence. The statement or request, if made by Mr. Martin, was only material as an implied admission of culpable negligence on his part.

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that which would subject him to censure, and, perhaps, loss of place; and if this deposit was in his mind, possibly charge the bank with its value. That it was in the mind of Martin, or that he intended to suppress, or foresaw the necessity of suppressing evidence in any action in a court of justice, there is not the least evidence. The request was made, doubtless, if made at all, to save himself and his acts from criticism, and for no other purpose; and it was only important as an admission, by implication, of neglect in protecting the bank against the robbery. If made for the purpose suggested, it was not an act by the corporation. He did not, in that conversation, although he may have supposed he was acting in the interest of the bank, represent it. He had no authority to speak or act for it, and it could not be affected by its acts and declarations made after the transaction, and when not acting within the limit of his authority, or in respect to a business over which he had authority to act for the bank. He had no incidental authority to make any declarations, binding upon the bank, in matters not within the scope of his ordinary duties. Story on Agency, § 115. An authority to speak and act for the corporation, in respect to litigations not pending or even anticipated, cannot be presumed. As a mere declaration or admission, tending to prove the fact in issue, it was not admissible, and should have been excluded. There is no principle upon which its admission can be sustained, and it should have been excluded. *Luby v. Hudson Riv. R. Co.*, 17 N. Y. 131; *Hamilton v. N. Y. C. R. R. Co.*, 54 id. 334; *Packet Boat Co. v. Clough*, MS. opinion of Judge STRONG, U. S. Sup. Ct., Oct. 7, 1874.

The declarations of agents are only admissible when made as part of the *res gestæ*, or in the performance of the duties of their agency.

The judgment must be reversed, and a new trial granted.

RAPALLO and ANDREWS, JJ., concur; all the other judges concur in result.

Judgment reversed.

NOTE.—See *Wiley v. First National Bank*, ante, p. 122.

In *The First National Bank v. Graham*, 29 P. F. Smith, 106, the Supreme Court of Pennsylvania decided that the mere voluntary act of the cashier of a bank in receiving securities as special deposits would not subject the bank to liability; but if the deposit was known to the directors, and they acquiesced in its retention, a contract relation was created by which the bank should be held bound, notwithstanding the bank had no express power by charter to receive deposits. The above case of *The First National Bank v. Ocean National Bank*, and the case of *Wiley v. First National Bank*, ante, p. 122, were disapproved of so far as they conflicted with such rule. The court said, referring to those cases: "If the question here had grown out of an act prohibited by law the principle of these recent authorities would be applicable as it was applied in *Fowler v. Scully*, 22 P. F. Smith, 456. But the question arises out of an act which has been neither directly nor impliedly forbidden by statute." The action was for the recovery of the value of United States bonds deposited with the defendant for safe-keeping.

The above decision of the Court of Appeals of New York, and that of the Supreme Court of Vermont, were cited with approval by the Court of Appeals of Maryland in *The Third National Bank v. Boyd* (not yet reported), but the question was not involved.

REP.

Frazer v. McCloskey.

FRAZER v. McCLOSKEY, appellant.

(60 N. Y. 337.)

Slander — repetition after action.

Is an action for slander, evidence of a repetition of the slander charged, or of the speaking of other slanderous words, after the commencement of the action, is not admissible to show malice and enhance the damages.

ACTION of slander. The words charged and proved to have been spoken by the defendant were in substance that plaintiff had stolen defendant's hay. Upon the trial plaintiff was also allowed, under objection, to prove that defendant had since the commencement of the action charged plaintiff with being a thief. This evidence was received for the purpose of showing malice.

The plaintiff had a verdict, and the judgment entered thereon was affirmed at General Term, and defendant appealed.

Isaac Mott, for appellant.

Brown & Sheldon, for respondent.

RAPALLO, J. We think that the court below erred in admitting evidence of slanderous words uttered by the defendant after the commencement of this action. It was claimed that this evidence was admissible for the purpose of showing malice and enhancing the damages for the speaking of the words charged in the complaint. It has been decided that a repetition of the words charged in the complaint, or the speaking of them at times other than those laid in the complaint, may be shown; but in all these cases, the occasions on which the slander was uttered were before the commencement of the action. In *Root v. Lowndes*, 6 Hill, 518, 519, the admissibility of the evidence was placed, by BRONSON, J., upon the ground that the judgment would be a bar to another action. In *Titus v. Sumner*, 44 N. Y. 266, evidence was admitted that the same slanderous charge was made by the defendant at times prior to those laid in the complaint; but the ruling was sustained by the Commission of Appeals solely on the ground that at the time of the trial an action for such prior slander was barred by the Statute of Limitations. The same decision was made, and for the same reason, in *Inman v. Foster*, 8 Wend. 602. The plaintiff should never be permitted to give in evidence words which might be the subject of another action. 6 Hill, 518, *supra*, per BRONSON, J.; *De Fries v. Davis*, 7 C. & P. 112, per TINDAL, Ch. J. The reason is obvious — the defendant might be compelled to

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pay damages twice for the same injury. In the present case, the words allowed to be proven, being actionable *per se*, and having been spoken after the commencement of the action, a second action would have been clearly maintainable for them. They were spoken in September, 1871, and the trial was in September, 1872. This action was commenced in February, 1871. In *Keenholts v. Becker*, 3 Denio, 346, it was expressly adjudicated that words spoken after the commencement of the action were not admissible to aggravate the damages; and we see no reason to question the correctness of that decision.

The words spoken in September, 1871, were different from those charged in the complaint. But this objection does not appear to have been distinctly taken at the trial. The only objection taken was that they were spoken after the commencement of the action. This objection, however, we regard as sufficient.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur; MILLER J., not sitting.

Judgment reversed.

HARTNETT V. WANDELL, appellant.

(60 N. Y. 346.)

Will — appointment of executor — delegation of authority to appoint.

A testator appointed his wife executrix of his will, and requested "that such male friend as she may desire shall be appointed with her as co-executor." *Held*, (1) that the delegation of power to appoint the executor was valid at common law; (2) that it was valid under a statute directing letters testamentary on wills to be issued "to the persons named therein as executors."

Semble where a testator delegates to an executor named in the will the power to select a co-executor, such selection can only be made after the executor named has duly qualified as executor.

APPEAL from a judgment of the General Term reversing an order of the surrogate of Albany county, dismissing the petition of Hartnett and others, creditors of Andrew Alexander, deceased, praying to have the letters testamentary issued to Wandell revoked.

The said Alexander died June 13, 1873, leaving a will wherein he gave his property to his wife, and concluded:

"I hereby nominate and appoint my said wife the executrix of this

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my will, hereby revoking all former wills by me made, and request that such male friend as she may desire shall be appointed with her as co-executor."

The will was admitted to probate, and letters testamentary issued to the wife, June 27th, 1873, and to Hartnett on petition of the wife, March 2d, 1874.

Esek Cowen, for appellant.

Robert H. McClellan, for respondent.

ALLEN, J. The sole question presented upon this appeal is as to the right of the appellant, in the absence of any objection to his personal fitness and qualifications, to receive from the surrogate of Albany county, letters testamentary as a co-executor with Mrs. Alexander, of the last will and testament of her husband, Andrew Alexander, deceased.

The right and power of a testator to provide for the due execution of his will, and the administration of his estate by a person not designated by name — that is literally "named" by him—is the important question. Those who controvert the power of a testator to provide for the execution of his will by a delegation of the power of naming an executor to another, or in any way except by a direct appointment of an executor, rest their objections upon the supposed limited jurisdiction of the Surrogate's Court, and more especially upon the rules of practice prescribed for that magistrate and the court over which he presides, by statute. In so doing, they make the tribunal, established as a means for giving effect to and carrying out the will, superior to and the means of defeating the will, and merely because the statute regulating the practice of the Surrogate's Court has not, as it is thought, provided in terms for precisely the case; and some of its provisions are not applicable in all respects to it.

The will before us is very brief and very direct. The testator directs the payment of his debts out of his personal estate; gives and devises the residue of his property, real and personal, to his wife; constitutes her the executrix of his will, and requests "that such male friend as she may desire shall be appointed with her as executor." This is the entire will. It is a model instrument, but it is insisted that the last clause is invalid, and incapable of execution under the statutes of this State; and these proceedings were instituted to annul an appointment of a co-executor, made in pursuance of the request therein made.

The power of a testator over his estate, the care and management as well as the ultimate disposition and distribution of it, is unqualified and

absolute, save only as restricted and limited by statute. The principal limitations have respect to the statutes of uses and trusts, and the law against perpetuities and unauthorized accumulations. Within the limits and for the time allowed by law, a testator may commit the administration of his estate and the care of his property to such individuals or succession of individuals, selected by himself or to be designated by others, as he pleases. As he can dispose of the whole estate he may dispose of the naked custody and the management of it for a limited period; and the disposal, whether for a temporary purpose or otherwise, may be, except as prohibited by statute, absolute or provisional, and conditional, or as others designated by him may from time to time direct. The clause of the will providing for a joint administration of the estate by the wife and a male friend to be selected by her is not in conflict with any law operative upon or affecting the power of one competent to make a will. A will not inconsistent with law gives the law for the custody and administration as well as the ultimate disposal of property. The sole difficulty suggested, and which by the Supreme Court was deemed insuperable, is that the surrogate cannot, by the strict letter of the law defining his powers, prescribing his duties and regulating the method of their performance, authenticate the powers of those to whom the testator would commit the execution of the will. But the authority of the executors is derived from the will and not from the letters testamentary issued by the surrogate. The latter are but the authentic evidences of the power conferred by the will, and are founded upon the probate of that instrument. It is true that by the statutes of this State, executors are not permitted to exercise their powers except to a very limited extent, until proof of the will and the granting of letters testamentary. 2 R. S. 71, § 16. But this does not affect the character of the office, or detract from the efficacy of the will as the source of the power. An executor derives power from the will, but an administrator owes his to the appointment of the surrogate. Lovelass on Wills, 382 *et seq.* An executor can derive his office from a testamentary appointment only. 1 Williams on Executors, 209, and note *a*. The appointment may be either express or constructive; and it may be an immediate designation, or an appointment by others by authority of the will. Mr. Williams, in his treatise on the law of Executors, says: "Although no executor be expressly nominated in the will by the word 'executor,' yet if by any word or circumlocution the testator recommend or commit to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors." 1 Williams on Ex. 209. The proposition is abundantly sustained by

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authority. The rule grows out of the fundamental principle universally recognized, that effect shall be given to the will of a testator when not contrary to the rules of law, as such will, and the intent of the author of it can be gathered from the whole instrument. 3 Redfield on Wills (2d ed), 70; *Carpenter v. Cameron*, 7 Watts, 51. *Bayeaux v. Bayeaux*, 8 Paige, 333, is an example of an appointment of an executrix by implication, or according to the tenor. The chancellor adjudged every part of the will void for the reason that it was so inartificially drawn that it was impossible to ascertain the intention of the testator except as to the appointment of an executor. The testator did not in terms nominate his wife as executrix, but by one clause of the will he appointed Jones C. Heartt as sole executor, in the event of the death of his wife, during the minority of his children, and from this and other clauses the chancellor concluded that the wife was by implication appointed executrix, and the will to that extent was established, and it was adjudged that the wife was entitled to letters testamentary. The courts have gone great lengths in giving effect to wills, designating or authorizing the designation of executors. When an executor has been expressly named in the will, another executor has been admitted according to the tenor, to probate, jointly with him who is named in the will as executor. *Grant v. Leslie*, 3 Phillim. 116; *Powell v. Stratford*, cited id. 118. When an executor was expressly nominated for general purposes, another person has been held to be executor according to the tenor for limited purposes. *Lynch v. Bellew*, id. 424. Executors may be appointed with separate functions, or to succeed each other in the event that those first named shall die, become incapacitated, or unwilling longer to serve, or two persons may be appointed to act for a definite period or during the minority, or during the absence from the country of one appointed executor. 3 Redfield on Wills, 53; *Anonymous*, Dyer 4, a; *Carte v. Carte*, 3 Atk. 174, 180; *Pemberton v. Coony*, Cr. Eliz. 164; *In re goods of Wilmot*, 2 Robert, 579; *In re goods of Langford*, L. R., 1 P. & D. 458; *Brightman v. Keighley*, Cr. Eliz. 43. Different executors may be appointed for different States and countries. *Despard v. Churchill*, 53 N. Y. 192. These and numerous other cases that might be cited are only referred to as showing the great liberality which the courts have exercised in committing the execution of wills to those indicated in any manner by the will and in accordance with the intent of the testator, and so as not to disappoint his wishes, regardless of technicalities. The practice of the courts has been accommodated to the will, rather than the will made to give way to technical forms and modes of procedure. In England probate was granted as executor to persons chosen by the legatees pursuant to the will of the testator

directing them to appoint two persons to execute his testamentary bequests. *In re Cringan*, 1 Hagg. 548. By the ecclesiastical courts letters testamentary are granted to persons, as executors, who are named for that purpose by those appointed in the will with that power. *In re Ryder*, 2 Sw. & Tr. 127; *In re goods of Deichman*, 3 Curteis, 123; *Jackson v. Paulet*, 3 Rob. 334. This practice is not in pursuance of any statute and does not grow out of the peculiar organization of those courts, or the forms and modes of procedure therein, but is exercised in the administration of the general laws of the realm, and to effectuate the wills of those competent to dispose of their property by will. The letters testamentary are granted in such cases as of legal right, and the rights of the claimants are adjudged upon the same principles as would control in the common law or equity courts of the realm, should the same questions arise and be presented for adjudication in those courts. The validity of an appointment of an executor, under a delegation of power, has been affirmed by the courts in Delaware. By a will made in the State of Delaware, by a citizen of that State, the testator, in the event of the executor named by him relinquishing the trust, authorized the Orphans' Court of the city and county of Philadelphia to name a suitable person as executor. Upon the relinquishment of the trust by the executor appointed by the will, the Orphans' Court of Philadelphia named a person for the office; and letters testamentary were issued to the nominee by the register of New Castle county. The court held that he was the executor of the will, and that letters testamentary were properly issued to him, instead of letters of administration with the will annexed. That the power delegated to the executrix, to nominate a male friend to be a co-executor with her, is not in excess of the power of the testator over his estate, and its administration after his death, or to provide a suitable agency for the execution of his testamentary bequests, cannot well be controverted. It is not inhibited by any statute of the State; is recognized by the common law; and is not violative of any principle of public policy.

It remains to inquire whether, by a reasonable interpretation of the statutes regulating the probate of wills and the procedure in Surrogates' Courts, the powers of testators have been curtailed, and the jurisdiction and patronage of surrogates enlarged. The jurisdiction of the surrogate is declared in general terms, and, so far as need to be referred to here, he has jurisdiction to hold a court: First. To take proof of wills of real and personal estate in the cases prescribed by law. Second. To grant letters testamentary and of administration. 2 R. S. 220, § 1. His jurisdiction to take proof of the will is conceded; and the power to grant

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letters testamentary is general, and not restricted by this section to a grant to any particular person or persons. He may grant them, unless restrained by some other statute, to executors expressly named in the will, or according to the tenor, or to any person entitled to them by law, and the common law prevails, except as modified by statute. The last paragraph of the section, declaring that the powers conferred shall be exercised in the cases, and in the manner prescribed by the statutes of the State, does not limit or restrict the jurisdiction, or qualify the general terms of the statutes conferring the jurisdiction and defining the powers of the surrogate. The "cases" in which he has jurisdiction, and the circumstances upon which his jurisdiction depends in taking the proof of wills, are stated and declared by Chap. 460 of the Laws of 1837. 4 Stat. at L. 486, § 1. The right to grant letters testamentary follows the probate of the will. There was no defect in the jurisdiction of the surrogate of Albany county to take proof of the will of the deceased and grant letters testamentary thereon. It was one of the "cases" in which he had jurisdiction. The surrogate must keep himself strictly within the limits of his jurisdiction and the powers conferred; that is, he must have jurisdiction of the subject-matter and of the persons. His jurisdiction of the subject-matter depends upon the facts; and he can only acquire jurisdiction of persons in the manner and by the process prescribed by law. That part of the act which declares that he shall exercise the powers conferred in the manner prescribed by law is not jurisdictional, unless it is restricted in its operation to the manner of acquiring jurisdiction by citation or other process, or by proof of the facts upon which jurisdiction depends, as the case may be. As a regulation of practice, when the surrogate has jurisdiction, it is modal, and does not affect the powers of the magistrate. A substantial compliance with the statutes would satisfy the act; and the statutes regulating the mode of procedure, like all rules of practice, should be liberally construed in furtherance of justice, and to give effect to the legal intent of testators. Neither a literal or technical construction, inconsistent with the general purpose of the law, or well-established principles, affecting the administration of estates and the operation and execution of wills, should be given to the statutes only affecting the mode of procedure in the Surrogate's Court. Stress is laid upon the statute regulating the granting of letters testamentary, and which enacts that the surrogate who takes the proof of a will of personal estate, shall issue letters testamentary thereon "to the persons named therein as executors," who are competent by law to serve as such, and who shall appear and qualify. 2 R. S. 69, § 1. A strict reading of the statute would restrict the issuing of letters to those literally "named,"

that is, designated by name as executors, to the exclusion of those who are described by their title of office, or in any other way by which they would be known, as well as those not named as executors, but who were such by implication, or according to the tenor. To come within the statute, literally interpreted, the person must not only be "named," but he must be named "as executor." But this is inconsistent with *Bayeaux v. Bayeaux, supra*. If any latitude is allowed in the interpretation of this statute, it should be read as authorizing the granting of letters testamentary to every person whose appointment or nomination as executor is testamentary in its character, as that term has been heretofore used and applied, and as it is used at common law. This would include all deriving their power under the will, whether mediately or immediately. There is no reason for excluding those appointed under authority derived from the will, and admitting those not in terms nominated as executors, but whose nomination may be implied as within the intent of the testator, as gathered from the will. Within a liberal and reasonable interpretation, and to give effect to the intention of the testator, the statute may be regarded as including within the convenient and generic term "named as executor," every one who can trace his authority to the will as its source. It is not to be inferred that the legislature intended by the phraseology of this section to effect a radical change in the law as to the persons entitled to letters testamentary as executors. No such design is indicated in the statute itself, or in the report of the revisers by whom it was reported. On the contrary, the section was reported to the legislature as but embodying in terms what was implied by the law then in force, which merely authorized the surrogate, after the probate of a will, "to grant letters testamentary thereon." 1 R. L. 445, § 3. We should expect to find more explicit language and some reference to it in the report of the revisers, if so great a change in the law affecting wills, and the power of testators, as is claimed to have been effected, had been contemplated by the framers of the law or the legislature.

Whether there would be any practical difficulty in substantially complying with the rules of practice and procedure prescribed by the statute for the proof of wills, and granting letters testamentary thereon, if there should be no executor named in the will, or he who was appointed by the will should decline to serve, and the only person who could claim the office under the will should be one appointed pursuant to a power given by the will, it is not necessary to consider. My impression is, that effect could be given to every material requirement of the statute in such case; but that question is not before us. By the will of Mr. Alexander an executrix was appointed, qualified to act, and who could have been sum-

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moned to appear and qualify, as prescribed by statute. Had she failed to comply with the statute, she would have been deemed to have renounced the appointment, and letters of administration with the will annexed would have been granted to some suitable person. The executrix named could take no measures for the designation and commissioning of a co-executor until she had qualified as executrix. *Jackson and Gill v. Paulet* 2 Robertson's Eccl. Rep. 344. Mrs. Alexander was named in the will as executrix, and did take upon herself the office, and qualify as required by law. The statute was literally complied with by the issue of letters testamentary to her. Speculations as to difficulties that might arise in other cases need not be indulged in. As executrix, and after the granting of letters testamentary to her, she was empowered by the will to select a male friend to serve with her as co-executor. Unless the statutes referred to above, directing to whom letters testamentary shall be granted, forbid the granting of letters to a co-executor upon the nomination of the executor named in the will, they may be granted consistently with every other part of the statute. All that can be said of the other provisions is, that they do not, in terms, provide for such an appointment. Every legal power and every legal trust conferred or created by will, that is, such as are not prohibited by or are not inconsistent with the law, may be executed by the executor. An executor may execute the will and carry out the testamentary intentions of the testator in such way, by such agencies, with such assistance, or such a division of labor and responsibility, as the testator may authorize. The will being legal in every part, every part may have full effect, including the power to the executrix to select a co-executor. To deprive her of this power might disappoint or substantially defeat the wishes of the testator. He may have foreseen that an intelligent and efficient aid and coadjutor would be necessary to the due execution of his will and the preservation of his estate, and he preferred to leave the selection to her to naming one in his will, who might not be living at his death, or whom it might not be desirable to select at that time, by reason of some change in the relation or situation of the parties. To deprive her of this power may compel her to surrender the trust, and give to others the management and custody of an estate wholly hers after the payment of debts. That this is not unreasonable, or contrary to the policy of the law, is evident from the provision made in respect to the administration of estates of intestates. Had Mr. Alexander died intestate the widow would have been entitled to letters of administration; and she could have joined the appellant or any other person with her in the administration. 2 R. S. 74, §§ 1, 34. When the testator has made her executrix and given her the like power.

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the rule should be the same. The reasons assigned by the surrogate for denying the application to vacate the letters to the appellant fully sustain his conclusions.

If there are objections to the competency of the appellant those interested in the estate may apply for his removal as executor for that reason. This application was based wholly upon the alleged invalidity of the delegated power to the executrix to name a co-executor, and the want of power in the surrogate to grant letters testamentary to her nominee.

The judgment of the Supreme Court should be reversed, and the order of the surrogate affirmed.

GROVER, J., dissented on the ground that the power of delegating the appointment did not exist under the statute.

WHELAN, appellant, v. LYNCH.

(60 N. Y. 469.)

Evidence — price-current list.

A price current list published in a newspaper is not evidence *per se* of market value.

ACTION against defendant as surviving partner of the firm of Smith & Lynch, to recover damages for the neglect of that firm to sell a quantity of wool consigned to them by plaintiff for sale.

The evidence tended to show that October 24, 1864, plaintiff had twenty-one bales of wool in the hands of said firm; that on that day he sent them an order to sell the wool forthwith; that defendant did not obey the instructions, and that plaintiff abandoned the wool.

Upon the trial plaintiff offered, and the court received in evidence, under objection, for the purpose of proving market value, the files of a newspaper styled the "Shipping and Commercial Lists Price Current," which purported to give the prices of different grades of wool.

The plaintiff had a verdict, and the judgment entered thereon was reversed at General Term, and plaintiff appealed.

A. R. Dyett, for appellant.

John F. Burrill, for respondent.

MILLER, J. [after deciding a question of damages.*] Independent

* At the trial the judge charged that if plaintiff was entitled to recover, he was entitled to the highest price between Oct. 24, 1864, and the time of the trial. The court held this to be error, and that the plaintiff could only recover the value of the wool at the time.

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of the charge, the court was also in error, I think, in admitting the Shipping and Price Current List as evidence of the value of the wool, without some proof showing how or in what manner it was made up; where the information it contained was obtained, or whether the quotations of prices made were derived from actual sales, or otherwise. It is not plain how a newspaper, containing the price current of merchandise, of itself, and aside from any explanation as to the authority from which it was obtained, can be made legitimate evidence of the facts stated. The accuracy and correctness of such publications depend entirely upon the sources from which the information is derived. Mere quotations from other newspapers, or information obtained from those who have not the means of procuring it, would be entitled to but little if any weight. The credit to be given to such testimony must be governed by extrinsic evidence, and cannot be determined by the newspaper itself without some proof of knowledge of the mode in which the list was made out. As there was no such testimony the evidence was entirely incompetent, and should not have been received. The authorities cited to sustain the ruling of the judge in regard to the admission of this evidence do not include any such case.

In *Lush v. Druse*, 4 Wend. 314, the witness who testified as to the market-price, had inquired of merchants dealing in the article, and examined their books; thus giving the source of his knowledge. In *Terry v. McNiel*, 58 Barb. 241, it does not appear in what form the question was presented, or whether any preliminary evidence had been introduced to show the accuracy of the newspaper quotations. In *Cliquot's Champagne*, 3 Wall. 117, it appeared that the price current was procured directly from dealers in the article, and was verified by testimony which tended to show its accuracy. The objections made to the evidence were sufficient, and its admissibility cannot be upheld within these cases cited.

Without examining the other questions for the errors stated, the order of the General Term must be affirmed, and, in pursuance of the stipulation of the plaintiff's attorneys, judgment absolute ordered for the defendant, with costs.

All concur; CHURCH, Ch. J., and FOLGER, J., in result.

Order affirmed, and judgment accordingly.

should have been sold under plaintiff's instruction or within a reasonable time (a week) thereafter. This point was decided on the authority of *Baker v. Drake*, 53 N. Y. 311; S. C., 13 Am. Rep. 507.

Audenreid v. The Mercantile Mutual Insurance Company.

AUDENREID, appellant, v. THE MERCANTILE MUTUAL INSURANCE COMPANY.

(60 N. Y. 482.)

Marine insurance — deviation.

A steam boat was insured for a voyage between two ports, with liberty to "touch and stay at any ports and places, if thereunto obliged by stress of weather or other unavoidable accident." On her voyage she stopped at an intermediate port to repair a defect in her chimney which existed and was known to her owners before she left the port of departure. While thus waiting for repairs she was destroyed by a peril insured against. *Held*, that the stoppage was such a deviation as to avoid the policy, and the insurers were not liable.

ACTION upon a policy of insurance issued by defendant to one Davis, and by him assigned, after loss, to plaintiff's testator. The substance of the policy and the circumstances of the loss are sufficiently stated in the opinion. Defendant's counsel asked the court to direct a verdict for defendant. This was denied and exception taken. The court directed a verdict for plaintiff, which was set aside by the General Term and a new trial ordered. Plaintiff appealed.

Francis Kernan, for appellant.

James C. Carter, for respondent.

ALLEN, J. The policy was upon the steamboat Meteor, her tackle, etc., at and from Philadelphia to New York, with liberty to touch and stay at any ports and places, if thereunto obliged by stress of weather or other unavoidable accident. The perils insured against were those of the sea and such as are covered by marine policies, including fires.

The vessel was destroyed by fire, after the commencement of the voyage, and while lying at the wharf at Chester, on the Delaware river, an interjacent port between Philadelphia and New York. The voyage was interrupted for the repair, at the place of the loss, of a defect or crack in the steam chimney, which existed and was known to the owners of the vessel before the departure from Philadelphia. The repairs were not made necessary by anything that occurred after the commencement of the voyage, or by any of the perils insured against. Neither was the steamer "obliged by stress of weather or other unavoidable accident," to touch or stay at the port or place at which she was burned. The delay at that place was the voluntary act of those in charge of the vessel, and was not excused by any of the circumstances which are recognized as justifying a deviation from the usual course of a voyage as between

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insurers and insured. If, therefore, the delay was a departure from the due and usual course of the voyage insured, it was a violation of the implied conditions of the policy, and the risk had terminated at the time of the loss. A deviation is a varying from the route insured against without necessity or just cause after the risk has begun, and the effect of a deviation is to discharge the underwriters whether the risk is thereby enhanced or not. It is not confined to a departure from or going out of the direct or usual course of the voyage, but it comprehends unusual or unnecessary delay, or any act of the assured or his agents, which, without necessity or just cause, increases or changes the risks included in the policy. Whenever the insurance is upon a specific voyage, there is an implied condition to be performed by the assured that the ship shall pursue the most direct course, and that the voyage shall be prosecuted to its final termination with a reasonable diligence and without unnecessary delays. Any failure to comply with this condition alters the nature of the risk assumed by the underwriters, and from the instant of such failure terminates the insurance. Park on Ins. 294; Arnold on Ins. 341, 342; Pars. on Marine Ins. 1. In an insurance upon a specific voyage the commencement and termination are given, and if the insured intends or designs that the voyage should be interrupted, the contract should provide for all the stops and delays intended in the course of the voyage. Otherwise the insurers will not be able to judge of the nature and extent of the risks to be encountered. If the insured may break up a single voyage between the termini named in the policy, at his own pleasure or for his profit or convenience, into several, by stopping at intermediate ports, he may essentially vary the risk, and the estimate of the underwriter will be of no value.

Permission to touch and stay at Chester for repairs or any other purpose was not given by the contract of insurance, and the risk was necessarily varied by such act. The vessel was exposed to perils while at the wharf, in charge of one or more of the hands, and the chief officers absent, which she would not have encountered in the due prosecution of the voyage. The voyage was also prolonged, and the continuance of the risk in point of time increased, if the policy was valid, while the vessel should be detained at the intermediate port, and was to continue as provided in the policy until she safely arrived at New York and "should be moored twenty-four hours in good safety." It is self-evident that a risk upon a vessel at and from Philadelphia to New York direct and without delay, is essentially different from a like risk, with liberty to touch and stay at intermediate ports. By a policy upon a vessel "at and from Philadelphia to Chester, and at and from thence to New York, or "at

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and from Philadelphia to New York, with liberty to stop at Chester for repairs," a different voyage is insured, and a different risk assumed, than by a policy on a voyage direct between the two extreme termini. If a vessel goes designedly and unnecessarily in the least out of her course, or lie by and interrupt the voyage without necessity and without the assent of the underwriter, the risk is substantially changed, and such change of risk is a deviation which terminates the insurance. 2 Pars. on Mar. Ins. 9. Lord MANSFIELD, in *Pelly v. Royal Ex. Assurance Co.*, 1 Burr. 341, says: "If the chance is varied, or the voyage altered by the fault of the owner or master of the ship, the insurer ceases to be liable."

In the absence of any usage or stipulation to the contrary, the meaning of the parties to the policy is that the ship shall proceed from one terminus of the voyage insured, to the other, in a direct course, with all due expedition and without touching at any interjacent port, or pursuing any intermediate adventure. 1 Arnold on Ins. 354; *Brown v. Tayleur*, 4 A. & E. 241; *Coffin v. Newburyport M. Ins. Co.*, 9 Mass. 436, *Hobart v. Norton*, 8 Pick. 159; *Fernandez v. Great West. Ins. Co.*, 48 N. Y. 571.

The question now under consideration cannot arise upon time policies, as there can ordinarily be no deviation under policies of that character. *Dixon v. Sadler*, 5 M. & W. 405, was upon such a policy. The cases involving the question of seaworthiness in different stages of a voyage, or those in which the effect of a license to touch and stay at intermediate ports are considered, some of which were cited by the learned counsel for the plaintiff, do not bear upon the case in hand, or elucidate any principle involved, and need not, therefore, be particularly referred to.

We are of the opinion that the policy was terminated by the interruption of the voyage and the delay at Chester without the assent of the underwriters. As this leads to a judgment for the defendant, we do not consider the other serious questions presented.

The order granting a new trial should be affirmed, and judgment absolute for the defendant, pursuant to stipulation.

All concur.

Order affirmed and judgment accordingly

Gates v. Beecher.

GATES v. BEECHER, appellant.

(60 N. Y. 518.)

Negotiable instrument — partnership note — bankruptcy of firm — demand of one partner.

Defendant was the indorser of a promissory note, made by a copartnership, in which no place of payment was designated. At maturity of the note the copartnership had been dissolved by its bankruptcy. *Held*, that a demand of one of the former copartners was sufficient to charge defendant.

ACTION against defendant as indorser of a promissory note made by the firm of Bassett, Beecher & Co. for \$800, bearing date May 31, 1870, payable two years from date.

In June, 1871, the firm of Bassett, Beecher & Co. was declared bankrupt, but there was no formal dissolution of the copartnership. Upon maturity of the note it was presented for payment at the last place of business of the makers, and thereafter it was presented personally to Bassett, one of the makers, and payment refused. It was thereupon protested and notice given to defendant.

Judgment was entered upon a verdict for plaintiff, which was affirmed at General Term (3 N. Y. Sup. 404), and defendant appealed.

F. W. Hubbard, for appellant.

H. J. Cookingham, for respondent.

FOLGER, J. [after deciding a question of practice.] No place of payment was named in the note. In such case, demand of payment at the usual place of business of the maker, though he be absent, is sufficient; or at his residence; or to him in person. *Holtz v. Boppe*, 37 N. Y. 634. And where such a note is made by a partnership, a demand of one of the partners in person, or a demand at the usual place of business of the partnership, is sufficient. Story on Prom. Notes, § 239. The makers of the note in suit were partners, and it was made by them as such, in their partnership name; demand of payment was made on the proper day, of one of them in person, after the notary had on the same day gone to the last usual place of business of the partnership, for the purpose of making demand there, and found no one of the firm. The name of the firm was Bassett, Beecher & Co.; and on the question being asked Bassett when a witness: "When did Bassett, Beecher & Co. stop business?" he replied: "They were thrown into bankruptcy in June, 1871." I think that we may infer from this that by

proceedings in the Bankrupt Court, the partnership was declared bankrupt, and its effects and affairs taken charge of by the officers of the law. The partners had separated, though there was no formal dissolution of their partnership by them. But bankruptcy of one member, or of all the members of a firm, works a dissolution of the copartnership. Story on Part., § 313. On this state of facts and the law, it is contended by the learned counsel for the appellant that the demand for payment of the note should have been made of each of the former partners. He cites no authority for his position. I have been unable to find any. If, by the dissolution of the partnership by bankruptcy, and the separation of the partners, they must thereafter be treated as joint makers who are not partners, I think that the force of the authorities is, that to charge an indorser of their note, a demand must be made of each of them, save where the other circumstances are such as to excuse a demand. For to charge the indorser of the note of joint makers, not partners, demand must be made on each. It was so held in *Union Bank v. Willis*, 8 Metc. 504, which case was proved in *Arnold v. Dresser*, 8 Allen, 435. In *Willis v. Green*, 5 Hill, 232, NELSON, Ch. J., said it was so settled; *Harris v. Clark*, 10 Ohio, 5, is to the contrary, but that case is limited in *Greenough v. Smead*, 3 Ohio St. 415. It is seen, therefore, that there is a distinction taken between the case of note of joint makers who are not partners, and a note of partners who are still partners at the maturity of the note. That distinction rests upon the fact that partners are but one person, in legal contemplation; that each partner, acting in such capacity, is not only capable of performing what all can do, and of receiving and paying out that which belongs to all, but by such acts necessarily binds them all; that, as incident to such joint relations, all of the partners are affected by the knowledge of one. These things do not pertain to the relation of joint makers who are not partners. Hence, while a demand of one partner is equivalent to a demand of all, a demand of one of joint makers not partners is not. 8 Metc., *supra*. And so a demand upon one partner is sufficient, because he represents the firm, and a dishonor by one is a dishonor by all, and each is presumed to have authority to act for the others; while in the case of a note of joint makers not partners, the indorser has a right to rely upon the responsibility of all and each, and may insist upon a dishonor by each. Story on Prom. Notes, § 255. So that the inquiry seems to be, whether a dissolution of a partnership, effected by the bankruptcy thereof, has so far changed the relations of the members of it as that the act or knowledge of one does not affect all the rest. Undoubtedly, a dissolution of a partnership, however brought about, puts an end to certain of the joint powers and authority of all the partners. Perhaps

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it may be said that no one of the partners can do any act in any manner inconsistent with the primary duty of winding up the whole concerns of the copartnership. This is emphatically the case when the dissolution has been wrought by the bankruptcy of the firm, for then the effects thereof have passed into the control of the court, and all payments therefrom or chargeable thereon are to be in the direction of the court, or according to its rules and practice. The principle on which a partner, during the existence of a partnership, may by his act bind his copartners, is that which governs the relation of agent and principal. The power of an agent to bind his principal ceases when the agency is ended; so that even payment by a former agent of a valid debt against his former principal, gives him no right against the latter. The principle has not, however, been carried so far in the case of a copartner. His relations with the other members of the firm have not been entirely severed. He may, from his own means, pay a valid subsisting debt against the copartnership, and have the right to claim an allowance therefor on the settlement of the affairs, or contribution from the others. *Major v. Hawkes*, 12 Ill. 298. And a general statement has been made by a text-writer of repute, that every act of administration which is necessary for winding up the concern may be effectually done by one partner, and the rest be bound. 2 Bell's Comm., bk. 7, c. 2, p. 643, 5th ed. And the author expressly includes in this a case of dissolution by bankruptcy, though it is apparent that the property of a bankrupt concern may not be meddled with by one of its former members. But it is clear that the relations of the individual members of the firm are not, by a dissolution thereof, so completely severed as that no act of one can have any effect upon the others. *Robbins v. Fuller*, 24 N. Y. 570. Each and all have still an interest in the settlement of the affairs of the firm, in the payment of its debts, and the adjustment of the liability of each to it and to each other, and in the just division of any surplus. Though the copartnership be insolvent, as in this case, and it be declared bankrupt, the members individually may be solvent, and liable to be affected by the final result of the bankrupt proceedings. And so there does, after a dissolution, still continue that common interest in past transactions, and in the present and future legitimate consequences therefrom, as that a joint power and authority in relation thereto continues; and while, after dissolution, no member of the late firm can by his act create a new liability against his former copartners, 24 N. Y., *supra*, or bind them to an alleged liability, *Hackley v. Patrick*, 3 Johns. 536, or revive an extinct one, *Van Keuren v. Parmelee*, 2 N. Y. 523, he may do some acts which shall affect and be binding upon them, when such acts are confined to matters in which they all still have a com-

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mon interest and are under a common liability. Thus, it has been held that one who was once a member of a dissolved partnership which, in its life-time, had indorsed a note in the firm name, might, after dissolution, waive demand of payment and notice of non-payment, *Darling v March*, 22 Me. 184; which decision was put upon the principle that, though dissolution revoked all power to make a new contract, it did not revoke the authority to arrange those before created and yet subsisting. And it being so, that the act of one of former partners, in relation to a valid subsisting liability of the late firm, does affect the others, and is taken as their act, and his knowledge thereof as their knowledge, there seems no reason why the refusal of one to pay, on demand, a note of the partnership, should not be deemed to be the refusal of all, and all be chargeable therewith. And then a demand of payment made to one, is a demand of payment made to all, and is sufficient upon which to give notice of non-payment to their indorser. And further, in aid of this idea, it is to be remembered that the contract of the indorser of the promissory note of a copartnership is that he will pay if the copartnership does not, while that of the indorser of the note of joint makers is, that he will pay if neither of them does. One joint maker, not a partner of the other, may not be able to speak for the other as to his ability or disposition to protect his promise and to save his indorser from liability, while one partner, though the firm has been dissolved, is supposed to know and care as much as the other of its ability and willingness in those respects. Again, the purpose of demand and notice to the indorser is, that he, being made known of the failure to pay by the copartnership, may be put at once on his guard, to save himself, if may be, from loss. This end is achieved when one of former partners has refused to pay, as when all have. Taking all the reasons for the distinction made by the law, between the case of a note of joint makers who are partners, and of that of joint makers who are not partners, and all the reasons for requiring a demand of payment of the maker, and notice thereof and of refusal to the indorser, in order to charge him, we are of the opinion that the rule that a demand of one copartner is sufficient, applies as well where the partnership has been dissolved as where it has not. It follows that the demand of payment in this case was sufficient. We find that this view is sustained in brief opinions in *Barry v. Crowley*, 4 Gill, 194; *Brown v. Turner*, 15 Ala. 832.

[The court then decided that the notice of protest was sufficient in form.]

Judgment affirmed.

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PEOPLE ex rel. TWEED, plaintiff in error, v. *LISCOMB*.

(60 N. Y. 559.)

Habeas corpus — legislative control of — when may issue to one held on final judgment.
Cumulative sentences.

The writ of *habeas corpus*, as it was known and used at common law, cannot be abrogated, or its efficiency curtailed by legislative action.

A statute excluded from the benefit of the writ of *habeas corpus* persons "committed or detained by virtue of the final judgment or decree of any competent tribunal." *Held*, that to debar an applicant from the benefit of the writ the judgment or decree must have been given by a court having jurisdiction to render such judgment. If there was no legal power to render the judgment or decree, there was no competent court and consequently no judgment or process.

Upon conviction of several misdemeanors, of like character, charged in separate counts of the same indictment, the court has no power to impose a sentence or cumulative sentences, exceeding in the aggregate the maximum punishment prescribed by statute for one offense of the character charged.

The prisoner was tried on an indictment containing many counts, each charging a different misdemeanor of the same kind. A verdict of guilty, on twelve counts, was returned and a separate sentence, to the full extent allowed by law for a misdemeanor of the grade charged, was imposed on each count. *Held*, (1) that the sentence for a single offense was good; (2) that the further sentences were in excess of the jurisdiction of the court and absolutely void and not merely erroneous; (3) that the prisoner, after the execution of one sentence, was entitled to discharge on *habeas corpus*.

APPPLICATION for a writ of *habeas corpus*. The defendant Liscomb was warden of the penitentiary on Blackwell's Island wherein William M. Tweed, the relator, was confined by virtue of a commitment issued upon a judgment of the court of Oyer and Terminer held in and for the city and county of New York.

It appeared that at a session of said court, held on the 22d day of November, 1873, the relator, Tweed, was tried upon an indictment containing 220 separate counts, each charging a misdemeanor; was found guilty upon 204 of the counts, and upon twelve of the counts was sentenced to twelve successive terms of imprisonment of one year each and to pay a fine of \$250 for each count; and upon other counts to additional fines amounting in all to \$12,500.

The maximum punishment fixed for a misdemeanor of the character charged was one year's imprisonment and a fine of \$250. Relator, having been imprisoned one year and having paid one fine of \$250, made application for a writ of *habeas corpus* to inquire into the legality of the continued imprisonment. The Oyer and Terminer refused to discharge the relator, and this judgment was affirmed by the General Term, 6 N. Y. Sup. 258, and the proceedings were brought to this court on error.

David Dudley Field, William O. Bartlett and George F. Comstock, for

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plaintiff in error. If the commitment, under which the relator is held, is not warranted by the judgment, or if the second and subsequent sentences are beyond the jurisdiction of the court, then the relator's imprisonment is illegal, and he has a right to be discharged on the writ of *habeas corpus*. 2 R. S. 563, §§ 21, 22, 48, 52; *People v. McLeod*, 3 Hill, 665; *Edymoin's case*, 8 How. Pr. 478; *Divine case*, 11 Abh. 90; *People v. Rawson*, 61 Barb. 619; *Miller v. Allen*, 11 Ind. 389; *James v. Ward*, 2 Metc. 271; *Brown v. Rice*, 57 Me. 55; *Chemung Canal Bank v. Judson*, 8 N. Y. 254; *Dobson v. Pearce*, 12 id. 156; *Snyder v. Plass*, 28 id. 465; *Rose v. Himely*, 4 Cranch, 241; *Elliott v. Peirsoll*, 1 Pet. 328; *Hickey v. Stewart*, 3 How. (U. S.) 750; *Ex parte Ah Cha*, 40 Cal. 426; *Hurd on Hab. Corp.* 324, 329, 344, 569; *Ex parte Lange*, 18 Wall. 178; *People v. Manyx*, Cent. L. J., Nov. 6, 1874; *Miller v. Allen*, 11 Ind. 389. All the sentences subsequent to the first were void. Whart. C. L., § 3; *Loomis v. Edgerton*, 19 Wend. 420; *Commonwealth v. Chapman*, 13 Metc. 68; *Carlton v. Commonwealth*, 5 id. 532. The statute law of New York appears to assume that only one crime can be charged in one indictment. 2 R. S. 728, §§ 56-58; id. 730, §§ 66-71; id. 734, §§ 9-11; id. 735, § 19; id. 737, §§ 28, 29; id. 738, §§ 1, 5, 6; id. 740, § 19; id. 726, § 42. A prisoner cannot be tried at the same time for two distinct and separate crimes upon one indictment, if any objection is made. *State v. Fowler*, 8 Fost. (N. H.) 184; *State v. Lincoln*, 49 N. H. 465; 1 Bish. Cr. Pro., §§ 205-213; *State v. Porter*, 26 Mo. 201; *Hampton v. State*, 8 Humph. 69; *McGregg v. State*, 4 Blackf. 101; *Baker v. State*, 4 Pike, 56; *Kane v. State*, 8 Wend. 203; *U. S. v. Pirates*, 5 Wheat. 201; *State v. Canterbury*, 28 N. H. 216; *State v. Fly*, 26 Me. 312; *State v. Marvin*, 35 N. H. 26; Whart. Cr. L. 204, 207; 1 Arch. Cr. Pl. 95; *Reg. v. Davis*, 3 F. & F.; *Rex v. Trueman*, 8 B. & C. 127; *Reg. v. Barry*, 4 F. & F. 389; *Reg. v. Burch*, id. 407; *In re Murphy*, 8 C. & P. 297; *Rex v. Breton*, 1 M. & R. 297; *O'Connell's case*, 11 Cl. & Fin. 374; *King v. Roberts*, Carth. 226; *King v. Clendon*, 3 Ld. Raym. 1572; 2 Str. 870; 2 Sess. Cas. 24; *Reg. v. Benfield*, 2 Burr.; *Young v. King*, 3 T. R. 105. The criminal courts had not power, by the common law, to sentence a defendant to be imprisoned for a term commencing at a future day. *Son v. People*, 12 Wend. 348; *King v. Regina*, 9 Jur. 833; *Miller v. Allen*, 11 Ind. 387; *James v. Ward*, 2 Metc. (Ky.) 271; *Ex parte Meyers*, 44 Mo. 282. Cumulative penalties are not, as a general rule, recoverable in this State in one action. *Sturgess v. Spofford*, 45 N. Y. 446; *Fisher v. N. Y. C. R. R. Co.*, 46 id. 644; *Brooklyn v. Toynbee*, 31 Barb. 283; *Clarke v. Lisbon*, 19 N. H. 288; 50 Barb. 573; *Kane v. People*, 8 Wend. 203; *Guenther v. People*, 24 N. Y. 101; *Reg. v. Cutbush*, 10 Cox's Cr. Cas. 489; *People*

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v. *Wright*, 9 Wend. 193 ; Barb. Cr. L. 319, 338, 372 ; *People v. Castello*, 1 Den. 83 ; *People v. Rynders*, 12 Wend. 425 ; *People v. Baker*, 3 Hill, 159 ; *Nelson v. People*, 23 N. Y. 298 ; *People v. Davis*, 36 id. 78 ; *Woodford v. State*, 1 Ohio St. 422 ; *State v. Nelson*, 8 N. H. 163 ; *State v. Merrill*, 44 id. 624 ; *Glines v. Smith*, 48 id. 270 ; *Fisher v. State*, 33 Tex. 793 ; *U. S. v. Dickinson*, 2 McL. 325 ; *U. S. v. Albro*, Cir. Ct. No. Dist. of N. Y. The relator was not liable to conviction and punishment for misdemeanor, under 2 Rev. Stat. 629, § 38, because a special provision had been made for the punishment of the delinquency charged. *Morris v. People*, 3 Den. 381 ; *Gregory v. Queen*, 15 Jur. 77 ; 9 id. 25 ; 11 Cl. & Fin. 155 ; 1 Park. 209 ; Arch. Cr. Pr. and Pl., Waterman's Notes, 1853, § 175 ; 3 Russ. on Crimes, by Greaves, 175. The jury was not competent, because not lawfully selected. *People v. Dewick*, 2 Park. Cr. 232 ; Laws 1872, chap. 476 ; Laws 1873, chap. 427 ; *Stokes v. People*, 53 N. Y. 173 ; *Calder v. Bull*, 3 Dall. 386 ; *Gut v. State*, 9 Wall. 35 ; *Cummings v. Missouri*, 4 id. 326 ; *People v. Hartung*, 22 N. Y. 99 ; *Withers v. Comm.* 5 S. & R. 60, 61 ; Purdon's Dig. 256, p. 36 ; 1 Chit. Cr. L. 253 ; *Comm. v. Dorsey*, 103 Mass. 412 ; *State of Louisiana v. McLean*, 21 La. Ann. 546. The Court of Oyer and Terminer was not a competent court to try this case, or pronounce any judgment in it. Laws 1855, chap. 337, § 5 ; Laws 1859, chap. 491 ; 2 R. S. 711, § 1 ; id. 714 ; Laws 1865, chap. 563 ; Laws 1872, chap. 284 ; Laws 1871, chap. 302 ; Laws 1857, chap. 769 ; *People v. Ransom*, 61 Barb. 102 ; *People v. Kenneda*, 2 Park. Cr. 312 ; *Plato v. People*, 3 id. 586 ; *Huber v. People*, 44 How. Pr. 375 ; *Van Loon v. Lyons*, Com. App.

Benj. K. Phelps, district attorney, and *Wheeler H. Peckham*, for defendant in error. As it appeared that the petitioner was held under a final judgment of the Court of Oyer and Terminer, upon a conviction of that court, the writ was properly dismissed. 2 Edm. Stat. 588 ; *People v. Cavanagh*, 2 Park. Cr. 650 ; *People v. Fancher*, 4 T. & C. 467 ; Ingersoll on Hab. Cor., Phila., 1849 ; note to *McLeod's Case*, 3 Hill, 659 ; *McLeod's Case*, 25 Wend. 572 ; *People v. Cassels*, 5 Hill, 164 ; *People v. Nevins*, 1 id. 154 ; *Bennac v. People*, 4 Barb. 31 ; *In re Prime*, 1 id. 340 ; *People v. Shea*, 3 Park. Cr. 562 ; *People v. Mayer*, 16 Barb. 362 ; *People v. Tompkins*, 1 Park. Cr. 224 ; *People v. Sheriff*, 29 Barb. 622 ; *Spalding v. People*, 7 Hill, 301. The Court of Oyer and Terminer being a court of general and criminal jurisdiction, its jurisdiction cannot be attacked collaterally. *People v. Cormack*, 4 Park. Cr. 9 ; *People v. Keeper of Penitentiary*, 37 How. Pr. 494 ; *McLeod's Case*, 3 Hill, 666 ; 2 C. & H. Notes to Phil. on Ev. 160 ; *Wood v. Peake*, 8 Johns. 69 ; *Rogers v. Bradshaw*, 20 id. 739 ; *Cook v. Darling*, 18 Pick. 393 ;

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Ferguson v. Mahon, 11 Ad. & El. 178; *Hart v. Seiras*, 21 Wend. 47; *Ex parte Kellogg*, 6 Vt. 509, 511; *Chemung Canal Bank v. Judson*, 4 Seld. 254; *Peacock v. Bell*, 1 Saund. 73; *Yates v. Lansing*, 9 Johns. 407; *Foot v. Stevens*, 17 Wend. 483. The court had jurisdiction to impose a sentence for each crime of which the relator was convicted, and the joining of several charges in one indictment did not oust the court of jurisdiction to impose punishment for more than one offense. 2 R. S. 700, § 11; 3 id. (5th ed.) 979; *Rex v. Williams*, 1 Leach's C. C. 536; *Rex v. Wilkes*, 4 Burr. 2577, 2578; *Gregory v. Regina*, 15 Q. B. 974; 19 L. J. (N. S.) Q. B. 366; 2 Chitty Stats. 145, 147; *Tichborne Case*, by Ward, Lock & Tyler, 286; 3 R. S. (2d ed.) 834; *U. S. v. Hudson*, 7 Cranch, 32; *U. S. v. Coolidge*, 1 Wheat. 416; 1 Brightley's Dig. 223, § 117; 273, § 4; U. S. R. S. 190, § 1024; 10 id. 161, 162; *U. S. v. O'Callahan*, 6 McL. 598; Arch. Cr. Pl. (17th Eng. ed.) 173, 174; 2 Hale's Pleas of the Crown, 173; 2 Hawk. Pleas of the Crown, 322; *Reg. v. Roberts*, Carth. 226; *Young v. King*, 3 T. R. 98; *Rex v. Kingston*, 8 East, 46; *Reg. v. Galloway*, 1 Moody's C. C. 234; *Reg. v. Johnson*, 3 M. & S. 549; *Reg. v. Jones*, 2 Camp. 132; *O'Connell's Case*, 11 Cl. & F. 155, 211, 241, 261, 272, 295, 385-394, 395-415; Burns on Justice, tit. "Indictment;" *Reg. v. Fussell*, 3 Cox's C. C. 291; *Carlton v. Commonwealth*, 5 Metc. 532; *Josslyn v. Commonwealth*, 6 id. 236; *Crowley v. Commonwealth*, 6 id. 581; *Commonwealth v. Hills*, 10 Cush. 530; *Commonwealth v. Cry*, 103 Mass. 214; *State v. Fuller*, 34 Conn. 280-282; *Commonwealth v. Birdsall*, 69 Penn. 482; *State v. Gummer*, 22 Wis. 421; *State v. Kirby*, 7 Mo. 317; 49 N. H. 465; *People v. Costello*, 1 Den. 83; *People v. Kane*, 8 Wend. 214; *People v. Rynders*, 12 id. 429; *People v. Baker*, 3 Hill, 159; *Hodgman v. People*, 4 Den. 235. An action in which several penalties are joined can be maintained. *City of Brooklyn v. Cleres*, H. & D. Sup. 231; *Johnson v. H. R. R. Co.*, 2 Swee. 298; *Fisher v. R. R. Co.*, 46 N. Y. 659. The court has jurisdiction to try misdemeanors. 2 R. S. 709, § 25, as amended by chap. 330, Laws 1830, § 61; 3 R. S. (5th ed.) 996, § 26; id. 1008, §§ 48, 49. The court had power to sentence the relator to be imprisoned in the penitentiary of the city of New York. Laws 1814, chap. 176; Laws 1824, chap. 213, § 1; Laws 1825, chap. 179; Laws 1830, chap. 42, § 8, p. 29; Corp. Ordinances, 1838-1839, p. 108, tit. 2.

ALLEN, J. The question of gravest import, and which is to be considered *in limine*, as that upon which the jurisdiction of the court to consider the other question presented depends, relates to the office and effect of the writ of *habeas corpus*, under our system of jurisprudence, and the statutes

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of the State regulating proceedings under it. Relief from illegal imprisonment by means of this remedial writ is not the creature of any statute. The history of the writ is lost in antiquity. It was in use before *magna charta*, and came to us as a part of our inheritance from the mother country, and exists as a part of the common law of the State.

It is intended and well adapted to effect the great object secured in England by *magna charta*, and made a part of our constitution, that no person shall be deprived of his liberty "without due process of law." Const., art. 1, § 6.

Whenever the virtue and applicability of the writ have been attacked or impugned, it has been defended, and its vigor and efficiency reasserted, as the great bulwark of liberty. The statutes which have been passed in England from the time of Charles II (31 Car. 2, c. 2), and in this State from the time of its first organization, have not been intended to detract from its force, but rather to add to its efficiency. They have been intended to prevent the writ being rendered inoperative, by increasing the facilities for procuring it, enlarging the class of officers having jurisdiction in respect of it, imposing penalties for refusal to grant it, or to obey it, and providing for a speedy return, and a prompt trial and discharge, of the person, if not held according to the law of the land. 3 Bl. Com. 135; *Ex parte Watkins*, 2 Peters, 193. The earlier statutes of this State did not profess to deal with or regulate the common-law jurisdiction over this writ, which existed in the Supreme Court and Court of Chancery, but had respect only to the jurisdiction conferred by statute upon, and exercised by, judicial officers out of court.

The Revised Statutes regulate the exercise of this jurisdiction, as well by courts as magistrates, embracing not only cases in vacation, but in term time. 2 R. S. 563; 5 id. (Edm. ed.) 511, revisers' notes. This writ cannot be abrogated, or its efficiency curtailed, by legislative action. Cases within the relief afforded by it at common law cannot, until the people voluntarily surrender the right to this, the greatest of all writs, by an amendment of the organic law, be placed beyond its reach and remedial action. The privilege of the writ cannot even be temporarily suspended, except for the safety of the State, in cases of rebellion or invasion. Const., art. 1, § 4.

The remedy against illegal imprisonment afforded by this writ, as it was known and used at common law, is placed beyond the pale of legislative discretion, except that it may be suspended when public safety requires, in either of the two emergencies named in the constitution. This provision of the constitution is a transcript of the former constitution of the State, and it cannot be intended that the framers of the Revised Statutes,

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by which the practice of the courts in term time was placed under the same regulations as that which had from the first been prescribed for the officers upon whom power had been conferred from time to time by statute, designed to interfere with the principles governing the exercise of the jurisdiction, or lessen the value, the efficiency or importance of the writ itself, which, in respect of the jurisdiction of the Supreme Court and Court of Chancery, was beyond the reach of legislation.

Bringing the procedure in term time, as well as in vacation, within the same general rules, removes all doubt that the intent was that every court and officer having power to grant a writ of *habeas corpus*, and to pass upon the legality of an imprisonment, has and may exercise, in the forms prescribed by law, all the power exercised at common law by the Court of King's Bench in England, and the Supreme Court of this State, as the corresponding tribunal with us.

There is no occasion to be alarmed, or to be frightened out of our propriety, lest, by reason of the number of magistrates to whom this great power has been committed, the judgments of superior courts will be nullified, and judicial proceedings rendered nugatory, so far as they interfere with personal liberty. The power has existed in many inferior magistrates for more than three-fourths of a century, and the laws and judgments of courts have been executed without unseemly interruption by means of this writ of liberty, and although a third of a century since a distinguished executive of this State called the attention of the legislature to the very danger now invoked as a reason for so construing the statute as to contract the jurisdiction of this writ, the legislature did not participate in the fears expressed, and suffered the statutes to remain in that form, by which the liberty of the citizen would have the largest protection. 3 Hill, 649, note. It is no new feature in the law that inferior magistrates may, when thereunto called, sit in judgment upon the jurisdiction of the highest courts, when their process or judgments come collaterally before them. Trespass will lie for property seized, or for the imprisonment of a person by virtue of the judgment of the highest court of the State, if it has not jurisdiction of the person, or to give the judgment, and a justice of the peace must pass upon the jurisdiction, if the action chances to be before him for trial. It matters not what the general powers and jurisdiction of a court may be; if it act without authority in the particular case, its judgments and orders are mere nullities, not voidable, but simply void, protecting no one acting under them, and constituting no hindrance to the prosecution of any right. *Elliot v. Peirsol*, 1 Pet. 328. The distinction between courts of limited and of general jurisdiction is this, that when their acts and judgments are relied upon, either as

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giving a right or furnishing a defense, jurisdiction of the latter is presumed, while that of the former must be proved ; but the presumption in favor of the jurisdiction of the court of general jurisdiction is one of fact, and not conclusive. It may be rebutted. If it depends upon the existence of certain facts, and the court has passed upon those facts, the determination is conclusive until its judgment has been reversed or set aside, and this rule is as applicable to the judgments of inferior as of superior courts. *Staples v. Fairchild*, 3 Comst. 41 ; *Chemung Canal Bank v. Judson*, 4 Seld. 254. There is nothing startling in the application of these well-recognized principles to proceedings by the *habeas corpus*, in favor of the citizen restrained of his liberty, under color of judicial proceedings, absolutely void. Neither should the *habeas corpus* act, which judges have "revered as the bulwark of the constitution, the *magna charta* of personal rights," be shorn of its power and its glory by a subtle and metaphysical interpretation ; rather should it receive a liberal construction, in harmony with its grand purpose, and in disregard, if need be, of technical language used.

This act has always been construed in favor of, and not against, the liberty of the subject and the citizen ; the reading must be the same whether the benefit of it is invoked by the purest and best citizen of the State, or the greatest sinner, and the one most worthy of condign punishment. The law is no respecter of persons, and suffers no man, be he guilty or innocent, to be deprived of his liberty, except "by due process of law ;" and the writ of *habeas corpus* is as available, even to the guilty, and he whom the popular voice would condemn, as it has proved against commitments by the king in council. But the act needs no interpretation, and is in full accord with the common law, and the adjudications both in this State and in England, and with the constitution.

Persons committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree, are expressly excluded from the benefit of the act. 2 R. S. 563, § 22. And if, upon the return of the writ, it appears that the party is detained in custody by virtue of such judgment or decree, or any execution issued thereon, he must be remanded. Id. 567, § 40. Such persons are deprived of their liberty "by due process of law," and are not within the purview of the constitution, or the purposes of the writ. To bar the applicant from a discharge from arrest by virtue of a judgment or decree, or an execution thereon, the court in which the judgment or decree is given must have had jurisdiction to render such judgment. The tribunal must be competent to render the judgment under some circumstances. The prohibition

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of the forty-second section of the *habeas corpus* act, forbidding the inquiry, by the court or officer, into the legality of any previous judgment, decree or execution specified in the twenty-second section, does not and cannot, without nullifying, in good measure, the provisions of that and other sections of the act take from the court or officer the power, or relieve him from the duty of determining whether the process, judgment, decree or execution emanated from a court of competent jurisdiction ; and whether the court making the judgment or decree, or issuing the process, had the legal and constitutional power to give such judgment, or send forth such process. It simply prohibits the review of the decision of a court of competent jurisdiction. If the record shows that the judgment is not merely erroneous, but such as could not, under any circumstances, or upon any state of facts, have been pronounced, the case is not within the exception of the statute, and the applicant must be discharged. If the judgment is merely erroneous, the court having given a wrong judgment when it had jurisdiction, the party aggrieved can only have relief by writ of error, or other process of review. He cannot be relieved summarily by *habeas corpus*.

The inquiry is necessarily in every case whether the process is void, and the officer or court having jurisdiction of the writ must pass upon it. If a process good in form issued upon a judgment of a court having jurisdiction, either general or limited, must in all cases be assumed to be valid until the judgment be reversed upon error, the remedy by writ of *habeas corpus* will be of but little value.

The distinction between judgments void and those erroneous, and therefore voidable, is recognized in all the cases to which we are referred. All the eminent jurists who delivered opinions in the celebrated case of *John V. N. Yates*, in its various phases and stages as reported 4 Johns. 318 ; 5 id. 281 ; 6 id. 337, and 9 id. 394, affirmed the doctrine, although they differed widely in their judgments in that particular case, but their differences, as well as the ultimate decision of the matter, turned upon the peculiar circumstances of the case, and do not bear, except very remotely, upon the question now under consideration.

Mr. Hill, in his valuable note to the *McLeod Case*, 3 Hill, 647, has carefully, and with his usual accuracy, epitomized the law relating to the writ of *habeas corpus*, and pointed out the departures under the statutes of this State, from the common law, and the propositions enunciated by him are well sustained by the authorities cited in the note, and, so far as applicable to the case in hand, may be briefly summed up. As well at common law as under the statutes of this State, if the party is detained on process, the existence and validity of the process are the only facts in is-

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sue, and the right to inquire into the validity of the process is co-extensive with that which is allowed in an action for false imprisonment. If the process is valid on its face, it will be deemed *prima facie* legal, and the prisoner must assume the burthen of impeaching its validity by showing a want of jurisdiction. Error, irregularity, or want of form, is no objection; nor is any defect which may be amended or remedied by the court from which it issues. If there was no legal power to render the judgment or decree, or issue the process, there was no competent court, and consequently no judgment or process. All is *coram non judice* and void. See 3 Hill, note, *supra*, pp. 659, 661 and 665, and cases cited. When a prisoner, convicted in a court of local limited jurisdiction, sought to be discharged on *habeas corpus*, on the ground that the offense was committed without the jurisdiction of the court, the application was denied, for the reason that the indictment charged the *locus in quo* to be within the jurisdiction of the court, and that fact must have been found by the jury, if traversed, or the jurisdiction was admitted, the court holding that the truth of the record could not be impeached on *habeas corpus*. The general principle that the want of jurisdiction appearing upon the record would be good cause for a discharge, was not questioned. *In re Newton*, 16 C. B. 97. *Rex v. Collyer*, Sayer, 44, was a *habeas corpus* for the discharge of persons in execution under a judgment which was illegal, because in excess of the power of the court. The Court of Quarter Sessions had jurisdiction of the offense, and of the persons of the accused, but the judgment upon an indictment for an assault was imprisonment one month, and that the defendants ask pardon upon their knees of the prosecutor, and cause an account of the sentence to be printed in the *Daily Advertiser*, and not to be discharged out of prison until the judgment has been duly performed.

The judgment was held illegal, except the imprisonment, and the defendants were discharged, and were not put to their writ of error.

In *Crepps v. Durden*, 2 Cowp. 640, in an action of trespass, a conviction by a justice of the peace for more than one penalty for exercising the ordinary calling of a party on Sunday for the same day, was held void, by reason of the excess of jurisdiction; the action was sustained, although the convictions were not quashed. The jurisdiction of the magistrate to convict and punish for one offense was not questioned, but the court adjudged that he had no jurisdiction whatever in respect of the three last convictions, for the reason that there could be but one offense, and one punishment for the acts of a single day.

In *People v. Cassels*, 5 Hill, 164, the court, by BRONSON, J., say that the prisoner had an undoubted right, when brought before the commissioner on *habeas corpus*, to show that the committing magistrate acted

without authority, notwithstanding the commitment recites the necessary facts to give jurisdiction ; that no court or officer can acquire jurisdiction by the mere assertion of it. Upon principle as well as upon authority, the court or magistrate having jurisdiction of the writ of *habeas corpus* must have the right, in order to give effect to the writ, to inquire into the jurisdiction of the court to give the judgment or decree, or issue the process by which the person is deprived of his liberty. In so doing he but inquires whether he is deprived of his liberty "by due process of law," or the judgment of a court of competent jurisdiction.

When a prisoner is held under a judgment of a court made without authority of law, the proper tribunal will, upon *habeas corpus*, look into the record so far as to ascertain this fact ; and if it be found to be so, will discharge the prisoner. *Ex parte Lange*, 18 Wall. 163. The court say it is no answer to say that the court had jurisdiction of the person of the prisoner, and of the offense, under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such a case.

In *Bigelow v. Forrest*, 9 Wall. 339, a judgment was held void, because in excess of that which by law the court had power to make. In the language of Judge MILLER, 18 Wall, *supra*, "in a case where the court had full jurisdiction to render one kind of judgment, operating upon the same property, it rendered one which included that which it had a right to render, and something more ; and this excess was held simply void." I see no escape from the conclusion that the jurisdiction of the Court of Oyer and Terminer, to give the judgment or judgment, which appear upon the record returned to this court, and by virtue of which the relator is held, was a proper subject of inquiry upon the return of the writ of *habeas corpus*. It was the only fact which the prisoner could allege, for, whatever errors the court may have committed prior to the judgment, if the court had power to make the judgment, they can only be reviewed by writ of error. In other words, upon the writ of *habeas corpus*, the court could not go behind the judgment ; but upon the whole record, the question was whether the judgment was warranted by law, and within the jurisdiction of the court.

This conclusion, as to the potency and efficiency of the writ of *habeas corpus* to test the jurisdiction of every court in the land, assuming, by its judgments, decrees and process, to deprive the citizen of his liberty, and which is entirely consistent with the history, uses and sacredness of the writ, and its connection with civil liberty and free government, makes it necessary to consider the questions made upon the record, of the convictions and judgments returned to us. Our examination will be confined

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to that record. We shall not assume to go back of it for any purpose, for by it must the jurisdiction, as challenged, be tried. Bearing in mind the distinction between judgments merely informal or erroneous and those void as without jurisdiction, *coram non judice*, the question is, had the Court of Oyer and Terminer the power to pronounce the several judgments, and inflict the accumulated punishments upon the conviction of the prisoner of the offenses, as charged in the single indictment?

Whether it was error to join in the same indictment counts for several distinct offenses, or whether the court should have compelled the prosecutor to elect between the several counts, are not questions that can be considered upon this hearing. They do not go to the jurisdiction of the court, and can only come up on error from the judgment. The court had jurisdiction of the person of the accused, and of criminal offenses committed within the county of New York, and necessarily had jurisdiction to pass upon the form and sufficiency of the indictment and the order and course of the trial, and decide every question that arose in its progress, and whether the determinations of the court, upon any or all of the questions, were right or wrong, did not affect the jurisdiction. In other words, the court had jurisdiction to make wrong, as well as right, decisions, in all the stages of the prosecution, and whether those made were right or wrong cannot be raised on *habeas corpus*. This renders it unnecessary to consider in much detail, or at all, except as they may incidentally aid in the consideration of the question actually presented, those cases in which the question has been as to the propriety of uniting, for the purposes of a trial, several offenses in one indictment, and the duty of the court to compel the prosecutor to elect when distinct offenses are so charged. In theory, every count in an indictment is for a distinct offense, but in fact, as is very well understood, in most cases, several counts are resorted to, and the same offense stated in different forms, and with different circumstances, to meet the evidence that may be adduced upon the trial. The class of cases in which indictments of that character have come under review can have no possible bearing upon the questions before us. In no event could there be, in such cases, but a single punishment, and that as for the one offense, charged in different ways, to avoid objections for variance.

But there are cases to which reference will hereafter be made in which distinct offenses have been joined in separate counts in the same indictment, and it has not been held error. How far these cases justify cumulative judgments aggregating a punishment in excess of that prescribed by law for the specific grade of offenses charged, will be considered in another connection. It is safe to say, however, that these cases do not

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necessarily warrant the conclusion that a conviction for several offenses thus charged is the equivalent of several separate convictions upon distinct indictments as authorizing several distinct judgments.

Reference is made, and stress laid upon the statutes of this State (2 R. S. 700, § 11), directing that, upon the conviction of a person of two or more offences, before sentence shall have been pronounced upon him for either, the imprisonment to which he shall be sentenced upon the second or subsequent conviction shall commence at the termination of the first or second term of imprisonment, as the case may be. This statute has respect to separate convictions upon distinct trials, and neither affirms or disaffirms the practice pursued in this case; and does not sustain it by implication or otherwise. The legislature had in their minds, evidently, convictions at different times, and cases in which judgment might be pronounced upon one conviction, before others were had; that is, convictions upon independent trials, or distinct indictments at the same terms of the court, or before sentence should be pronounced upon either. It is to such cases, and such only, that the statute has hitherto been deemed applicable. It cannot be regarded as authority for the procedure in this case, and as changing the law, and if it was so intended, the courts have been very dilatory in ascertaining its scope and effect. The revisers explain the reason for recommending its adoption, and it is merely to guard against possible omissions in the form of sentence usually at that time pronounced in the class of cases mentioned. 5 R. S. (Edm. ed.) 560. Precedents for the practice, provided for by the statute thus understood, have been very familiar in this State, but I am not aware that there were or are any for the practice of several judgments, each for the extreme penalty of the law for each of several offenses, charged in the same indictment, and upon a single conviction. What is popularly known as the *Tichborne Case* is claimed to be a direct authority for the conviction and sentences in the case at bar. The prisoner was convicted, upon a trial before Lord Chief Justice COCKBURN and his associates, of two distinct acts of perjury, upon separate counts in an indictment, and sentenced upon each to transportation for the term of seven years, as for disconnected offenses; and it is said that the time named is the extreme limit of punishment upon a single conviction for the crime charged. But if it be so, then there was a conviction for two offenses, which in this State would be felonies, on the same trial, which is not permissible with us. The decision cannot be regarded as authoritative evidence of the law with us. It is enough to say that no question appears to have been made to the judgment, and whether it is as authorized by some statute, we do not know. Be that as it may, the judgment has not received the deliberate

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sanction of any court *in banc*, and has not ripened into a precedent, even in England. It is, at most, but evidence of what the common law is, as now administered in that country, but no evidence as to what it was on the 19th of April, 1775. The practice of uniting several courts in an indictment is a departure from the ancient practice. Lord DENMAN says, in *O'Connell v. Queen*, 11 Cl. & Fin. 375, that in old times the indictment consisted of a single count, and it may be assumed that this is true. In the words of eminent counsel in a brief in another case, now before me, this "device of inserting many counts to avoid a variance did not change the law governing at the trial."

There is no objection to stating the same offense in as many different ways as may be deemed expedient. It cannot mislead the accused, or embarrass him in his defense, or expose him to accumulated punishments. But the rule, as now recognized, extends further than this, and different misdemeanors may, it is said, and with a show of authority, be joined in the same indictment, and tried at the same time. This change in the administration of the criminal law, affecting, substantially, the rights of persons accused of crime, rests mainly for its sanction upon the more modern practice of the courts, and the extent of the change thus made in the law can only be certainly known by a reference to the cases in which the questions have been adjudicated, and ascertaining the principles upon which they rest. If there could be but one punishment, or punishment as for a single misdemeanor, irrespective of the number of offenses proved, and of which he should be convicted by the verdict of the jury, although he might be embarrassed in his defense, and prejudiced with the jury, the court could possibly see that no great harm could come to the accused by a joinder of offenses. If the rule has this limit, then there is reason for the limitation, as found in the books, that to authorize a joinder of different offenses, they must be of the same grade, and require the same judgment. If judgment may be distributive and cumulative, it is difficult to see why there should be an identity as to their character and extent of punishment. Statutes have been necessary to permit offenses of different degrees, and requiring different punishments, although relating to the same subject-matter, to be joined. 1 Arch. Cr. Pr. and Pl. 94; *Kane v. People*, 8 Wend. 203; *People v. Wright*, 9 id. 193. The adjudications of our own State come far short of warranting distributive or cumulative punishments upon distinct counts, and for different offenses.

The first case to which we are referred is *Kane v. People*, *supra*. The plaintiff in error was indicted for non-performance of his duties as a director of a turnpike company. The indictment contained two counts, and there was a general verdict of guilty, and a fine imposed of \$200

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Upon error the first count was held defective, but the verdict and judgment were applied to the second count, and the judgment affirmed. It is true the chancellor says *obiter*, that if a distinct punishment had been inflicted for the offense charged in each, the judgment would only have been reversed as to the first count. This, at most, is but an intimation of the opinion of the chancellor, that separate judgments might have been given on each count, but it is not evidence that the law authorized it; and there is no intimation that the court could have done more than distribute the full measure of punishment prescribed for a single misdemeanor between the offenses charged in the two counts.

People v. Rynders, 12 Wend. 425, was an indictment charging the prisoner, in different counts, with making, forging and counterfeiting, and uttering and publishing as true, a check on a bank, and the conviction was of the forgery. The court merely held there was no misjoinder of counts, and that the prosecutor was not bound to elect upon which count he would ask a conviction. *People v. Baker*, 3 Hill, 159, has just as little bearing upon the question now before us, simply holding, that whether a district attorney should elect between counts, charging different felonies, was discretionary with the court, and not the subject of review on writ of error. *People v. Costello*, 1 Den. 83, was an indictment against three persons for attempting to procure an abortion upon one Zulnia Marache. In two of the counts the attempt was charged to have been made by administering drugs, and in the other two by means of an instrument. On the trial evidence was given implicating all in the use of the instrument, and two in the administering of drugs, and the jury found two guilty on all the counts, and the three on the first and second. The court held that when it appeared that Costello was not implicated in one of the offenses, the prosecutor should have been put to his election, and a new trial was ordered. *Hodgman v. People*, 4 Den. 235, decides, that on the trial of an indictment for selling liquor without license, the prosecutor can only give evidence of as many distinct offenses as there are counts in the indictment. The indictment contained five counts, and on a general verdict of guilty a fine (a single punishment) was imposed, but for the error in the admission of evidence the conviction was reversed. The case is not authority for cumulative punishment. *People v. Gates*, 13 Wend. 311, was an indictment for obtaining the signature of one John Ludlow to an instrument in writing by false pretenses, the same offense being charged in different forms in two distinct counts. The court merely say, in answer to the objection, that the prosecutor should have been made to elect between the two counts, that that was in the discretion of the Court of General Sessions, and assert generally that a defendant may be.

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tried at the same time for different offenses charged in the same indictment, if the offenses are of the same grade, and subject to the same punishment.

I have thus, and at greater length than would ordinarily be deemed necessary, referred to the several cases cited from our own reports, and it will be seen that no warrant can be found in any of them, or in any remark, casual or otherwise, by any judge, for cumulative punishments upon a conviction of several offenses charged in a single indictment, the aggregate punishment exceeding that prescribed by law, for the grade of offenses charged. The rule, as claimed by implication, calls for a single judgment for all the offenses charged in the indictment, and of which the accused is convicted. It requires that the offenses joined shall be of the same grade, and be subject to the same punishment; that is, not only punishment the same in kind, but the same in degree. This can only be important to the end that a single judgment, equally applicable to each of the offenses, may cover all, and a sentence, the maximum of which may be lawfully imposed for each. If several judgments may be given upon a single indictment, upon a conviction for several disconnected offenses, and the punishments may be successive and cumulative, there is no good reason why the offenses joined should be of the same grade, or subject to the same punishment, for the court might so impose the sentences for the respective offenses that each could be fully carried out without interfering with the others. A prisoner convicted of several misdemeanors, for which different penalties were prescribed, might be flogged for one, fined for a second, and imprisoned for a third. If the doctrine contended for by the prosecution can be maintained, the qualification of the rule that the joined offenses must be equal in the law, subject to the same punishment, has no foundation in principle and must fall. If, as has been done in some cases, the maximum punishment which the law permits for the grade and character of offenses charged, is distributed among the several offenses of which the prisoner is convicted, according to the demerits of each, the aggregate punishment not being in excess of that allowed by law for a single offense of the same kind and degree, there would probably be nothing illegal, conceding that a person accused of crime may be tried upon one indictment, for several and distinct offenses, committed at different times. Eminent counsel claim, with great plausibility and show of reason, that the rule permitting the trial of a person for several offenses at the same time, is not authoritatively established, and that it ought not to be. I cannot do better than to quote liberally from the brief of Mr. O'Connor before referred to, and adopt his language, for the reason that he very clearly and tersely expresses the

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position and the argument in support of it, and which I deem worthy of consideration. That eminent jurist, after referring to the analogy between civil actions for penalties, and criminal prosecutions, says: "And accordingly, except under some statute expressly authorizing such a course, it has not been the practice to allow two distinct offenses to be tried at the same time, either by indictment or penal action. Besides the confusion and embarrassment in which a trial at one time for many offenses would involve the accused, such a practice, if tolerated, would break down and utterly obliterate many principles of law that are not only well established, but essential to the safety of the citizen. Nothing is better settled than that the evil reputation of the accused shall not be offered to strengthen the proofs against him. That other misdeeds shall not be alleged, proved, or attempted to be proven, is equally well-known law. If the public prosecutor, or a common informer in a penal action, could put an unpopular person on trial for every delinquency imputed to him by common fame, such an one, however innocent, might often sink under the weight of unmerited opprobrium. The usage of employing numerous counts to guard against a possible variance between the allegation and the proof, is the sole cause of any misapprehension concerning this matter, which may appear in some few judicial opinions. Because there may be many counts in an indictment or declaration, and each on its face must be for a different offense, it has been hastily assumed that distinct and different transactions, occurring at different times and places, and constituting so many different offenses, may be given in evidence on the trial of an indictment, on a penal action. The few cases that are to be found giving an apparent sanction to this notion are not sufficient to establish it."

The learned counsel, with his usual acumen and discrimination, reviews the cases in a note to the brief, and shows that his position is not without foundation, and I incline to concur with him in opinion. His arguments appear to me unanswerable. The practice of putting a man on trial for distinct offenses, at the same time, is fraught with danger to the accused, and can never be done except at great risk of doing injustice. The law is tender of the rights of those accused of crime to the extent of securing to them, by every means, a fair and impartial trial by a jury of the country, and protecting them against a conviction under the forms of law, but without an observance of and adherence to all the forms and rules of law calculated to protect the innocent. But if the practice should be regarded so firmly established that it cannot be reformed except by the legislature, the result of distinct judgments and cumulative punishments does not follow legally, logically, or necessarily. Reference will be made to

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the reported decisions in England, in which it is claimed the foundation was laid, not only for the joinder of several distinct misdemeanors in one indictment, but for cumulative sentences or punishments. But it is quite evident that there would probably be no precedents of cumulative punishments, each to the full measure allowed by law, as they were imposed in the case before us. The reason is obvious. In England the punishment for misdemeanors is, as a general rule, discretionary with the court. 1 Russ. on Crimes (4th London ed.) 92; 1 Ch. Cr. Law, 710; 56 Geo. 3, chap. 128; 1 Vict., chap. 23. As the court could in all cases, upon a conviction of one or more misdemeanors, pass such judgment, and impose such punishment, as it should deem proper and apportioned to the crime or crimes charged, cumulative sentences, each fully exhausting the statutory power of the court in respect to a single offense, could not be imposed, as there is no such limit; and cases in England within this rule and form of punishment would give no color or support to the present judgment. The doctrine is said to have had its origin in an expression of Lord MANSFIELD in *Rex v. Benfield*, 2 Bur. 980. In speaking of the decision in *Rex v. Clendon*, 2 Strange, 870, in which it had been held that an assault on two people could not be joined in the same indictment, Lord MANSFIELD thought this not to be the law, and said: "Cannot the king call a man to account for a breach of the peace, because he broke two heads instead of one?" This remark suggested a rule, whether sound or not, which has no possible application to the case at bar, and could not in any sense justify the joinder of distinct offenses, committed at different times, in the same indictment. If by a single act like this a criminal offense be committed against two or more persons, there may be good reason why they should be joined. Otherwise the guilty party may be twice punished for what is, in substance, but one offense. *Rex v. Wilkes*, 4 Burr. 2527; S. C., 19 How. St. Trials, 1132, is not an authority for joining distinct offenses in one indictment. It is an authority for sentence of imprisonment upon a second conviction to commence at the termination of an imprisonment upon a prior conviction, to which the practice of this State has conformed, and is now, as we have seen, sanctioned by statute. The report of the case shows that there were two informations for libel, one exhibited in Michaelmas Term, 1764, for a seditious and scandalous publication in the *North Briton*, and the other exhibited soon thereafter, for an obscene and impious essay on woman. The defendant was convicted of both libels, and was outlawed on each, and was separately sentenced for *each*. See 4 Burr. 2527, 2578.

Gregory v. Reg., 15 Q. B. 974, was error from a conviction upon an information for libel, containing four counts, and the judgment of the

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court sentencing the prisoner to be imprisoned two months on each of the counts, the imprisonment on each after the first to be computed from the expiration of the imprisonment on the next preceding count. The third count was held defective, and the court adjudged that the imprisonment on the fourth count was not thereby invalidated as commencing *in futuro*, but that it was to be computed from the expiration of the imprisonment on the second count. No other question was raised or decided. Whether the distributive judgment was legal, was not considered, and the aggregate punishment was not in excess of that which might have been inflicted for a single offense. Wilkes was sentenced to imprisonment for twelve calendar months upon each conviction for a like offense.

In *Young v. The King*, 3 Term R. 98, the same offense was stated differently in three counts, and but one transaction was under investigation upon the trial. Upon a general verdict of guilty a single sentence was passed upon the prisoner. To the objection made on error, that distinct offenses were joined in the indictment, Lord KENYON said, the objection would be well founded, if the legal judgment on each count was different: "It would be like a misjoinder in civil actions. But in this case the judgment on all the counts is precisely the same; a misdemeanor is charged in each. Most probably the charges were meant to cover the same facts; but if it were not so, I think they may be joined in the same indictment." With him the other judges agreed, but Justice BULLER states the practice in a way which would prohibit a trial for distinct offenses at the same time. He says: "On the face of the indictment every count imports to be for a different offense, and is charged as at different times. And it does not appear on the record whether the offenses are or are not distinct. But if it appears before the defendant has pleaded, or the jury are charged, that he is to be tried for separate offenses, it has been the practice of the judges to quash the indictment, lest it would confound the prisoner in his defense, or prejudice him in his challenge of the jury; for he might object to a juryman's trying one of the offenses, though he might have no reason to do so in the other. But these are only matters of discretion."

The case gives no countenance to the doctrine of cumulative punishments, but by implication is adverse to it.

King v. Roberts, Carthew, 226, merely held the information fatally defective, as too general and not distinctly stating a single offense. No other question was before the court, and nothing else was decided, except that the judgment should be arrested, because no offense was well and sufficiently stated in the information.

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I am unable to discover the applicability of *Rex v. Kingston*, 8 East, 41, or anything in the arguments of the judges applicable to this case. Nothing was said in disposing of the demurrer there, that has the remotest bearing upon the question before us.

Rex v. Galloway, 1 Moody's C. C. 234, does not advance the argument of the prosecutor. The prisoners were charged in the first count of the indictment with burglary and larceny; and in the second count with feloniously receiving the same goods, knowing them to have been stolen. They were found guilty on the second count only. The legality of the conviction was submitted by the recorder to the judges, and they were unanimously of opinion that the charges might legally be joined, and the conviction was affirmed; but they were equally divided whether the prosecutor should have been put to his election, "and thereupon they all agreed that directions should be given to the respective clerks of Assize, not to put both charges in the same indictment."

King v. Johnson, 3 M. & S. 539, is authority for joining in an indictment a count for embezzlement of bank notes, under a statute of the realm, with a count for larceny of the same notes; and this, I infer, was by reason of the peculiar phraseology of the statute against embezzlement, which declared that the offender should be deemed to have feloniously stolen them, constituting the offense a felony the same as larceny.

Rex v. Jones, 2 Camp. 131, is a *nisi prius* decision. The prisoner was indicted for frauds committed by him as a commissary-general, and the question was whether the prosecutor could give evidence of part of the sums which the defendant had illegally obtained under one count, and of the residue under another, and it was held he could. Lord ELLENBOROUGH says: "I see not the slightest objection to evidence of various acts of fraud committed by the defendant in his office of commissary-general, though charged under different counts, as distinct and substantive misdemeanors."

It is quite evident that convictions and separate punishments for distinct offenses were not in the mind of the counsel or the judge. It is authority for the admission of proof of distinct acts, charged in different counts to prove a single crime, to wit, fraud and peculation in office.

We are referred to the responses of the judges of England to certain questions propounded them by the House of Lords, in the case of *O'Connell*, reported 11 Clark & Finnelly, 155-426. The verdict in that case was general upon all the counts of the indictment, and a like general judgment passed against the accused upon the verdict, without discrimination, and as one judgment. Some of the counts were bad, and the judgment was reversed for that reason. The contention was, whether

the verdict and judgment could be applied to the good counts, and thus sustained. The learned judges discuss *seriatim*, and at great length, the practice in trials of indictments for felonies and misdemeanors, and the rule as to joinder of counts, for distinct offenses on the two classes of indictments, but still nothing was definitely determined in the judgment of the court, or can be gathered from the concurrent opinions of the judges, that will aid us in passing upon the question presented by this record. It would be difficult to deduce from the opinions collectively, or that of any single judge, that, when the punishment for a specific offense is limited by statute, and not by the discretion of the court, and a conviction is had under an indictment consisting of several counts of several offenses, distinct and distributive sentences could be imposed for the different convictions under the respective counts, which would aggregate a punishment in excess of that prescribed and limited by statute for a single offense ; that is, that the several punishments combined could be in excess of that which could, pursuant to statute, be imposed upon a conviction under any one of the counts. The real question considered, and in respect to which these opinions must be read and interpreted, was whether the verdict and judgment could be applied to the good counts, and thus sustained. There was clearly no excessive punishment over that which might have been inflicted upon a single conviction under any one of the counts. It may be conceded that expressions are used by some of the judges, authorizing an inference that the punishment, in the aggregate, upon several counts, might be in excess of that which would, in the discretion of the court, not which could by law, be inflicted upon a single count, or for a single offense. But it is not so said in terms, and certainly is not, and could not, have been so decided ; and the judges were not called upon to, and did not, answer any interrogatory which would resolve that question.

If the rule prevails, as is claimed in support of the judgment, it may and must have effect in all courts of criminal jurisdiction, whether general or limited ; and a Court of Special Sessions, held by a single justice of the peace, may try an individual for any number of misdemeanors of the same grade, of which the court has cognizance, at the same time and upon a single complaint, and upon a conviction impose successive and cumulative sentences of imprisonment and fine, to the full extent of the law for each offense. For the rule, if it exists, does not grow out of the character of the court, but is a part of the law of the land, of general application. It would follow that upon the result of a single trial a justice of the peace, sitting as a Court of Special Sessions, may mulct the convicted party in separate penalties of twenty-five dollars each, to the

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extent of his property, and imprison him from six months to six months *ad libitum*. *Regina v. Outbush*, 10 Cox's Cr. Cas. 489, is adverse to this logical sequence of the rule claimed in support of the convictions in the case before us. One Paine was convicted, under the vagrant act (5 Geo. 4, c. 83), upon four separate informations, and sentenced upon three of the convictions to be imprisoned at hard labor for three calendar months, and upon the fourth conviction to a like imprisonment, to commence at the expiration of the first three calendar months' imprisonment. Upon an application for a writ of *habeas corpus*, on a rule to show cause, the cumulative sentences were sustained upon what Lord COCKBURN, C. J., terms, "by some degree of technical straining" of the words of a statute Vict. 11, 12, c. 43. But for the statute, the prisoner would have been discharged for the invalidity of the convictions and sentences. This is very good evidence that the common law, as administered in England, does not authorize several convictions and cumulative sentences, as in the present case; and that the party illegally imprisoned under sentences unauthorized by law can have relief by *habeas corpus*.

Congress has thought it necessary to provide, by statute, for the joinder of several charges against the same person for the same act or transaction, or for two or more acts or transactions of the same class of crimes or offenses in one indictment in several counts, but no provision is made for several judgments on one record. 10 U. S. Stat. at Large, 162; U. S. Rev. Stat., § 1024.

We have an authoritative exposition of the statute from Judge NELSON, late associate justice of the Supreme Court of the United States, a judge of long and varied experience in the courts of this State and of the United States. Upon the conviction of one Albro, in the Circuit Court of the United States, for several distinct offenses united in a single indictment, under the act of Congress referred to, the court was moved, in behalf of the government, for separate sentences and distinct punishments for the several offenses of which the prisoner had been convicted. The court, holding the application under advisement until the succeeding term, denied the application, and gave a single judgment as for one offense. It was held, Judge NELSON announcing the result of the deliberation of himself and his associate, Judge HALL, that the act did not change the common law as it existed in the State of New York and was administered by the United States courts, sitting in the State, and that the government was not entitled to a judgment upon a conviction of a prisoner of several offenses under one indictment containing distinct counts, except as for a single offense. This is very satisfactory evidence, not only of the true rule of the common law, but that the practice of imposing cumu-

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lative sentences in such a case was unknown, and during the fifty years of the judicial life of that eminent judge, he had never known or heard of the exercise of such a power. The case goes far to answer the argument in favor of cumulative sentences derived from the alleged practice of trying several distinct offenses at the same time, as it shows that, although such practice be expressly authorized by statute, the power to inflict cumulative sentences does not result and is not allowable. It is proper to state that we are indebted to the district attorney of the United States, prosecuting for the government, for a report of this case.

In Massachusetts there is a similar statute, with the additional provision that successive convictions may be had, and limiting the aggregate term of imprisonment under any one indictment. Stat. of 1861, chap. 181. In England various statutes have been enacted from time to time, which would not have been necessary had the rule of the common law been as claimed by the learned counsel for the prosecutor. Without referring to others, it suffices to notice 14 and 15 Victoria, chapter 100, section 16, which makes it lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, that may have been committed by him against the same person within the space of six months, and to proceed thereon for any or all of them. See, also, Archbold's Cr. Pl. and Pr. (16th ed.) pp. 66, 67, 68; Geo. 4, chap. 28, § 48. One reason assigned by courts in England for permitting the joinder of distinct misdemeanors while it is disallowed in felonies, is that upon a trial for felony the accused has the right of peremptory challenges, which is not given on trials for misdemeanors. To allow a joinder of different felonies in the same indictment, would deprive the prisoner of some of the challenges allowed by law, which consequence would not result by a like joinder of misdemeanors. With us the same reason does not exist for distinguishing between felonies and misdemeanors, as peremptory challenges are allowed on trials for both classes of offenses. Every person put on trial for any offense not capital, or not punishable with imprisonment in the State prison for ten years or longer, is entitled to five peremptory challenges. Laws of 1847, chap. 134. This statute gives one put on trial for a misdemeanor in a court of Oyer and Terminer the right to challenge peremptorily five of the persons drawn as jurors for such trial. By uniting 220 distinct misdemeanors in one indictment, the accused, upon being arraigned and put on trial, is either entitled to 1,100 peremptory challenges, or is deprived of the right in respect to 219 of the offenses for which he is put on trial.

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If the distinct offenses charged are but fifty-five, or any less number, the proportion of challenges allowed, or of which the accused is deprived, is only changed. The principle is the same. The joinder of felonies is disallowed in England, because the prisoner's right of challenge would be reduced, and the same result follows a joinder of misdemeanors here, and the prisoner is deprived of a right given him by law. The reason for the distinction between felonies and misdemeanors in this respect in England would forbid the joinder of distinct misdemeanors in the same indictment in this State and under our statutes.

It may be added that prior to 1847 the right of peremptory challenges on trials for misdemeanors was not allowed in this State, and hence the dicta apparently contradicting the practice found in our reports prior to that time may well have followed the English cases. The necessity of this legislation shows that the true rule of the common law does not countenance the practice and the judgment in the case before us.

I have examined with some care the cases in the courts of this State and of England to which we have been referred, or which have come under my observation, and I find no authority for holding that the common law, as it existed in England in April, 1775, or as it exists and is administered in this State at this time, permits cumulative sentences to be imposed upon conviction for several distinct misdemeanors, charged in different counts in a single indictment, in the aggregate exceeding the punishment prescribed by law as the extreme limit of punishment for a single misdemeanor. I do not regret this. A proper administration of the criminal law, as well in the public interest as for the protection of those accused of crime, requires a different rule. The power of the court was exhausted by one sentence to imprisonment for one year, and the payment of a fine of \$250; or if several judgments can be pronounced by a sentence, the same in the aggregate, distributing such punishment and apportioning it to the convictions upon the several counts, according to the demerits of the offenses charged in each, each and every of the judgments and sentences, in excess of that limit, was *coram non judice*. A judgment in the form and to the extent allowed by law once pronounced, the power of the court became *functus officio*, in respect to that prosecution and the indictment, except to see that the judgment was executed. There was no longer any record or verdict upon which the court could act. The jurisdiction over the person of the condemned was exhausted, and as if no prosecution had ever been instituted against him. The purposes of the prosecution and of the indictment had been accomplished. If the punishment for the offense is fixed by statute, a judg-

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ment in excess of the statutory limits is void for the excess, as we have seen by adjudged cases *supra*.

A party held only by virtue of judgments thus pronounced, and therefore void for want of jurisdiction, or by reason of the excess of jurisdiction, is not put to his writ of error, but may be released by *habeas corpus*. It will not answer to say that a court having power to give a particular judgment can give any judgment, and that a judgment not authorized by law, and contrary to law, is merely voidable and not void, and must be corrected by error. This would be trifling with the law, the liberty of the citizen, and the protection thrown about his person by the bill of Rights and the constitution, and creating a judicial despotism. It would be to defeat justice, nullify the writ of *habeas corpus* by the merest technicality, and the most artificial process of reasoning.

There may be, and probably is, a distinction between cases where the punishment is discretionary, as in England in most cases of misdemeanor, and those in which there is a limit fixed by statute, as in this State. No court can give a judgment valid for any purpose not authorized by law. A prisoner condemned for grand larceny, for which the statutory punishment is imprisonment in the State prison for a term not exceeding five years, and who is sentenced for ten years, is not, after the expiration of the first five years, held by "due process of law," or the "judgment of a court of competent jurisdiction." No court is or can be competent to pronounce a sentence and give judgment in open and palpable violation of a positive statute, and a judgment thus given is simply void.

With us all punishments are prescribed by statute as well as to character as extent, and a sentence not conformable to law as not warranted by statute, or which is in excess of the legal punishment, is *ultra vires*, and like every other act, whether judicial or ministerial, done without legal authority, is void. A sentence to imprisonment in the State prison for a misdemeanor would be void, as would a sentence to imprisonment, when only a fine was the statutory penalty. A fine of \$1,000 for a misdemeanor, unauthorized by law, would not protect an officer in the execution of process for its collection of the property of the condemned, or by detaining the person until the fine should be paid. If a court having jurisdiction of the accused, and of the offense with which he is charged, may impose any sentence other than the legal statutory judgment, and deny the aggrieved party all relief except upon writ of error, it is but a judicial suspension of the writ of *habeas corpus*. That writ is alike a protection against encroachments upon the liberty of the citizen by the unauthorized acts of courts and judges, as against any mere arbitrary arrest.

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The indictment, in this case, is an anomaly, and is probably without precedent, but it may have been justified by the peculiar circumstances of the case. But if a statute was necessary in England to the joinder of three or four offenses in one indictment, in several counts, and to proceed thereon in respect to any or all of them, it can hardly be claimed that the common law allows 200 separate offenses to be charged, and a trial and conviction and separate punishments for fifty distinct offenses. No precedent has been found for the practice. The justification is to be found, probably, in the fact that great wrongs had been perpetrated, and the punishment as for a single misdemeanor was deemed entirely inadequate to the offense, and the public mind was greatly excited, and called for what would be thought an approximate vindication of the law, and a somewhat appropriate punishment for the offender. I would not be thought to differ with the trial court in respect to the character of the offense, or of the inadequacy of the statutory punishment upon a single conviction. The remedy was by several indictments, if the offenses were distinct. But courts can only administer the laws as they find them, and it is far better that the most guilty should escape, than that the law should be judicially disregarded or violated. A greater public wrong would be committed, one more lasting in its injurious effects, and dangerous to civil liberty and the sacredness of the law, by punishing a man against and without law, but under color of law and a judicial proceeding, than can result from the escape of the greatest offender, or the commission of the highest individual crimes against law.

Neither the cause of justice or of true reform can be advanced by illegal and void acts, or doubtful experiment by courts of justice, in any form, or to any extent. From some expressions of judges, and the remarks of text-writers, there was some color for the idea that several distinct offenses could be tried at the same time. But there was no real or true warrant in this State for several and distinct judgments upon a single indictment in the law, and for that reason the prisoner should have been discharged upon the expiration of the imprisonment for one year and the payment of a fine of \$250.

The judgment and orders of the Supreme Court and of the Oyer and Terminer must be reversed, and the prisoner discharged.

RAPALLO, J. The question submitted to us in this case is of more than ordinary importance. Its decision will result not merely in determining the extent of the punishment of the particular prisoner now before us, but either in establishing in this State a rule of procedure in criminal cases which will most materially affect every individual who may be

hereafter charged with offenses of a grade inferior to felony, or in rejecting the rule claimed by the prosecution as not founded in sound legal principle or consistent with our system of criminal jurisprudence. For this reason, we have permitted an unusually extended discussion of the question at our bar, during which we have heard the views of eminent counsel on both sides, and it may be assumed, from the great research displayed in their briefs, that we have been furnished with all the authorities in this State, in England, and in the several States of the Union which, in their judgment, at least, could throw light upon the subject. We have also retained the case under advisement more than the usual time, during which we have given a careful consideration to the authorities cited. It is not my purpose now to review those authorities. Such of them as were mostly relied upon on the argument have been referred to and analyzed in the opinion of my learned brother, ALLEN, J. I propose simply to state the leading reasons which, after full reflection upon the subject, I deem controlling, and which determine me to concur in his conclusions.

In the decision of so grave a question, the consideration whether the punishment inflicted in the particular case is more or less than was justly merited for the offenses proved, has no legitimate place. It is the province of courts to declare the law as they find it to be, and adjudge cases accordingly; not to change or strain the law to make it fit any particular case.

The main question now presented for decision is, whether several separate and distinct offenses, each amounting to a misdemeanor, upon which an indictment could be framed, may be charged in one indictment in separate counts, and the prisoner put upon his trial for all the alleged offenses at the same time, before the same jury; and, in case the jury render a general verdict of guilty on all the counts, or a verdict of guilty on various specified counts, whether the court has power to pronounce a separate sentence on each count upon which the prisoner is found guilty, and thus aggregate sentences on a single indictment and trial to an extent far in excess of the maximum punishment prescribed by statute for the grade of offense for which the prisoner has been indicted and tried.

The bare statement of the question suggests to every mind accustomed to reflect upon such subjects, the enormous injustice and oppression which might result from the adoption of the rule which an affirmative answer to this question would establish, and discloses how effectually such a rule of procedure would obliterate many of the most valuable safeguards which the law has thrown around the trial of persons accused of crime. Laws are framed not merely to secure the punishment of those who are

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justly accused, but to afford a fair trial to all and guard against convictions being obtained through improper means or influences. The law, therefore, furnishes, as far as possible, to every defendant, the means of knowing precisely of what he is accused, of securing an impartial jury, and all reasonable opportunity for presenting his defense; and it prohibits the introduction against him of any evidence not bearing upon the question of his guilt of the particular crime charged, and carefully excludes evidence which merely tends to create prejudice against him by showing that he is a person of bad character, or guilty of crimes other than that for which he is upon trial. The generally accepted and recognized principle is, that a man shall be tried for only one crime at a time, and convicted only upon evidence of the commission of that crime, and not upon proof of other crimes which show him to be a fit subject for punishment. If it were proposed at a Court of Sessions or Oyer and Terminer, at which a prisoner was arraigned for trial upon fifty separate indictments for as many different offenses, to try all the indictments at the same time and before the same jury, the common sense of every layman, as well as lawyer, would revolt at the proposition; and yet it is claimed that the same result can be accomplished, in cases of misdemeanors, by uniting all the charges in the same indictment. The evils are the same in both cases. Evidence of each misdemeanor would naturally prejudice the jury against the prisoner in determining upon his guilt or innocence as to each of the others. Evidence which would be legally inadmissible as to some of them, would be necessarily admitted if competent as to some other. The prisoner might, himself, be obliged to introduce evidence to exculpate himself from some of the charges, which would have a bearing prejudicial to him (though, perhaps, illegitimately so) on the trial on the others. The result at which the law aims, of making each criminal charge depend upon its own merits, would be frustrated.

If the rule claimed by the prosecution is sound, it is equally applicable, as stated in the opinion of my brother, ALLEN, J., to trials before inferior courts or magistrates, upon complaints for petty offenses for which they have jurisdiction to impose only a short term of imprisonment. If a vast number of such offenses can be united in one indictment and separately punished, they can, with equal propriety, be united in one complaint and tried together, and the result would follow that a magistrate or Court of Special Sessions, to whom the legislature had confided the power of trying only such offenses as are punishable by fine or imprisonment not exceeding one year, could upon a single trial sentence a prisoner for a term exceeding the possible duration of his life.

It is clear that the rule claimed is subject to very serious objections,

and has little, if anything, to recommend it, and could only be made useful by being carefully guarded by statutory restrictions. If the public prosecutor finds that several distinct misdemeanors have been committed, and he desires the infliction of a separate punishment for each, he can, under existing law, obtain separate indictments and try each upon its own merits; the prisoner will then be enabled to avail himself of his right of challenging jurors on the trial of each indictment, and the evidence of the prosecution and of the defense will be confined to the matter charged in that indictment, and the punishment proportioned, within legal limits, to the gravity of the offense proved; and even if, under an indictment containing several counts, the proofs should disclose that the offences were distinct and might have been the subject of separate indictments, the court can compel the public prosecutor, either during the course of the trial or at its close, to elect upon which count he claims a conviction. But the rule claimed that the prisoner can be tried at the same time on, as in this case, over fifty different charges, and in case of conviction, punished separately on each, should not, in my judgment, be adopted, unless it can be shown to have been established by authority, to which the court, on the principle of *stare decisis*, ought to yield its own convictions of right.

In searching for authority for such a course of procedure, we naturally turn in the first instance to the statutes of our own State. After a diligent search we find there nothing adapted to the enforcement of such a practice, or recognizing its existence; on the contrary, all the provisions in relation to indictments, trials and punishments for crimes and misdemeanors, seem to contemplate but a single conviction and sentence on every indictment.

We next turn to the reports of the adjudicated cases in our own courts. From the organization of the judiciary of this State to the present time, notwithstanding the industrious researches of counsel and our own, we are not referred to, nor do we find, a single reported case in which cumulative sentences have been imposed on a conviction of several offenses under one indictment, nor in which the power to inflict such sentences has been adjudged. The dicta on this subject, found in some reported opinions, are explained in the opinion of my learned associate, ALLEN, J.

We then appeal to the experience of the members of our own court, several of whom have presided for a great number of years over courts of criminal jurisdiction in this State, and some exercised the office of public prosecutor. None of them, speaking either from experience or tradition, can cite a case in which such a power has been exercised or sanctioned in this State.

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It thus appears, as far as a negative proposition is capable of being established, that there is no authority in this State for the course now attempted to be sustained, although occasions for such a course must have frequently occurred, and that we are called upon to introduce a new doctrine into our jurisprudence contrary to our previous practice, and as I think the majority, if not all, of my brethren will concur with me in saying, contrary to our ideas of order and justice in the administration of criminal law.

Statutes of the United States, and of some of our sister States, and of England, have been referred to, which, in certain cases, and under restrictions, allow the joinder of several criminal charges in one indictment. But these statutes rather disprove than prove the right at common law to pursue that course; else why the necessity of enacting them?

Now, what is the authority upon which we are called upon to introduce into this State this new practice. It is to be found only in the opinions of judges of courts in England, of a date later than that up to which, by our constitution, we adopted the common law of England; and, unless in a single very recent case, in which the question was not raised or discussed, or any reason given (the Tichborne case), no practical application of the rule appears from any of the cases cited to have been made, cumulating sentences on separate counts to an extent greater in the aggregate than could have been inflicted upon either of the counts alone. Upon the strength of these opinions elementary writers have stated it to be the law, that various *misdemeanors* may be joined in one indictment under several counts, and tried at the same time, and separate convictions had, although it is conceded that, where the offense amounts to a felony, there can be but one conviction and one sentence under one indictment. The same statement has been repeated in some American cases in other States, but as these are few, and those to be found conflict with each other, and none of them are authority here, it is not useful to go into them in detail.

It may not be out of place, however, to remark, in passing, that in Massachusetts, after the practice had obtained in some of the counties, founded on local custom, to unite and try several distinct offenses under *one* indictment, the legislature of that State enacted a statute, providing that "two or more counts, describing different offenses, may be set forth in the same complaint or indictment depending upon the same facts or transactions, provided that the different counts therein are different descriptions of the same act." General Statutes of 1861, chap. 181. This is a clear legislative condemnation of the theory of cumulative convictions and punishments under one indictment, as there can be but one punish-

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ment for the same act. And even in excise cases, which are a class *sui generis*, a statute of that State provides "that several parties and offenses may be included in the same complaint, and several offenses tried at the same time and successive convictions had; but the whole aggregate term of imprisonment under any one complaint or indictment, or at any one term of the court, for such violation, shall not exceed one year." The case cited from Pennsylvania (*Commonwealth v. Birdsall*, 69 Penn. 482), if deciding what is claimed by the prosecution, is in conflict with the settled law, as well of England as of this State, as it would sanction the union of several felonies. We have been referred to no other precedents in support of the doctrine claimed, which call for special observation, while the general current of judicial sentiment in other States is decidedly adverse to it.

Before we adopt the doctrine that several misdemeanors may be joined, a doctrine of comparatively modern growth, let us see on what ground the distinction is made between *felonies* and *misdemeanors*; whether there is any distinction in principle, so far as this inquiry is concerned, and whether the distinctions assumed to exist under the law of England, even if sound there, have any application under the laws of this State. A very brief examination will show that the reasons assigned in England for this distinction, even if sound there, are totally inapplicable here. In the first place, it is material to observe that the punishment for misdemeanors in England is, or was at the time when this doctrine was enunciated there, in the generality of cases, discretionary with the court; the court had unlimited power to sentence for any term, however long. The term was not, as here, defined and limited by statute; consequently, although a prisoner might be sentenced to various successive terms of imprisonment on different counts in the same indictment, it could not be said that the aggregate of these terms was greater than the court had power to impose, if it chose to do so, on either one of the counts.

But the main reasons assigned in the English cases for the distinction, in this respect, between felonies and misdemeanors, are these: The judges say that a prisoner cannot be tried for various distinct felonies under one indictment, because it would embarrass him in his defense, confound the jury and confound the prisoner, and prejudice him in his challenges of the jury; the law of England allowing to the prisoner a certain number of peremptory challenges in cases of felony. But they say that this objection to the joinder of several offenses in one indictment does not exist in cases of misdemeanor, because in those cases, by the law of England, the prisoner has no right of peremptory challenge; hence, although different felonies cannot be tried under the same indictment, different misdemeanors can.

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It is not easy to perceive why uniting several charges of different offenses in the same indictment is not as likely to embarrass the prisoner in his defense, and confound him and the jury, in cases of misdemeanor, as in cases of felony. But, perhaps, the English judges, in view of the entire control which they could, in general, exercise over the conduct of the trial, and the amount of punishment to be inflicted in cases of misdemeanors, considered that it was in their power to adjust any difficulties which might arise in that class of cases, while they could not exercise like powers in cases of felony where the punishment was prescribed by law. Here, the punishment in cases of misdemeanor is limited by statute in all cases. I may not have given a very good explanation of the grounds of the distinction made in England between indictments for misdemeanors and felonies, but, if so, it is owing to the difficulty of finding any better ground for such distinction, so far as confusion on the trial is concerned. The essential difference, however, between the law of this State and that of England, and one which entirely destroys the reason upon which the alleged distinction there depends, is, that in this State the right of peremptory challenge is secured by statute in cases of misdemeanor, as well as in cases of felony; and the reason assigned in England for not allowing a prisoner to be tried for several felonies at the same time applies here with equal force to trials for misdemeanors.

Had the charges preferred in the several counts of the indictment, in the present case, constituted felonies, as defined in our statutes, and had the court, on receiving the verdict of the jury convicting the prisoner upon all or any number of the counts, rendered separate sentences upon each, for successive terms of imprisonment, exceeding in the aggregate the *maximum* which the court was empowered, by statute, to impose for the offense charged in any of the counts, I think it safe to assert that, in respect to the excess, there could be no difference of opinion in this court, at least, as to the nullity of the sentence in respect to the excess. If, therefore, as I have endeavored to show, it possessed no greater power on conviction upon an indictment for misdemeanors than upon an indictment for felonies, the conclusion is very plain and simple, that so much of the sentence as exceeds the bounds of the maximum term of imprisonment authorized by law for any of the misdemeanors of which the prisoner was convicted, is void for want of power in the court to render it.

A brief reference to some of the statutes in relation to misdemeanors, and to that upon which the prisoner was indicted, may throw some light upon the subject.

The offense for which the prisoner was indicted and tried in this case was wilful neglect of a duty enjoined upon him by law, viz., that of au-

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ding certain liabilities of the county of New York, under the act of 1870. Whatever other offenses he may have committed, that was the only one for which he could be punished in this prosecution. The statute under which he was indicted reads as follows (2 R. S. 696, § 38): "When any duty is, or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, when no special provision shall have been made for the punishment of such delinquency, shall be a misdemeanor, punishable as herein prescribed." Section 40, p. 697, declares the punishment, and provides that "every person who shall be convicted of any misdemeanor, the punishment of which is not prescribed in this or some other statute, shall be punished by imprisonment in a county jail, not exceeding one year, or by fine not exceeding \$250, or by both such fine and imprisonment." Clearly there is nothing in this provision which points to more than one conviction or punishment on any one indictment. The indictment in the present case contained 220 counts, each of which assumes to charge a separate willful neglect of duty — supposing that the matter charged in each count constituted a separate offense for which the prisoner might have been separately indicted, and tried and punished. Yet when they are all united in one indictment, and trial, we find no satisfactory authority for the rendition of more than one judgment, although the prisoner may have neglected his duty on 220 occasions, and the charge of neglect of duty may have been proved against him on the trial 220 times over; all that the court had power to adjudge was, that he was guilty of a misdemeanor, and should receive the *maximum* punishment for that offense prescribed by the statute. The very next section of the statute shows cumulative punishment on one trial could not have been dreamed of by the legislature. Section 41 provides that "the court before whom any person shall be convicted of an offense punishable by imprisonment in a county jail" (which in this case), "may sentence such person to imprisonment in a solitary cell in such jail, if any such be erected, but such imprisonment shall in no case exceed thirty days in the whole." Here it is seen that the severity of that description of punishment, solitary confinement, is recognized by the legislature, by providing that where it is inflicted the whole imprisonment shall not exceed thirty days, that being treated as equivalent to one year of ordinary imprisonment. Can it be conceived that the legislature intended or supposed that in a case like this 220 offenses could be charged, and fifty-five convictions had, each of an offense punishable by imprisonment in a county jail, and fifty-five successive terms of solitary imprisonment, of thirty days each, inflicted — a punishment which writers upon the subject have

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stated is regarded as more severe, even, than the death penalty, and one which but few prisoners can long survive. That this doctrine of cumulative punishments on one indictment could never have entered the mind of the legislature, is made still more clear by reference to the general provisions relating to misdemeanors. Take one instance: 2 Rev. Stats. section 26, provides that "Every person who shall by his act or neglect maliciously kill, maim, wound, injure, torture or cruelly treat, any horse, mule, ox, cattle, sheep or any other animal belonging to himself or another, shall, upon conviction, be adjudged guilty of a misdemeanor." Suppose one were convicted under one indictment containing 100 counts of ill-treating 100 different sheep; the rule sought to be introduced by the prosecution, if established, would authorize the court to sentence him to 100 years of imprisonment, or 100 terms of thirty days each of solitary confinement. If the *power* exists to inflict cumulative sentences, such a sentence as is supposed could not be reviewed by a higher court, for it would be a mere exercise of judicial discretion within legal limits, and not an error of law. On convictions for misdemeanors, which are regarded under our statutes as offenses of the lightest grade known to the law, and are triable in the lowest courts, those courts might impose heavier sentences than the highest criminal courts would have power to inflict for the most aggravated felonies. No such incongruity should be imputed to our law.

For the reasons which I have stated, I am of opinion that, upon any, indictment for misdemeanor, no matter how many counts it may contain, or whatever may be the form of the verdict, the power of the court to sentence is restricted, as in cases of felony, to the maximum punishment allowed by statute for the highest offense charged in the indictment; and that separate and cumulative punishments can only be secured by separate indictments and trials for each offense. If my brethren concur with me in this conclusion, the right to be relieved from further imprisonment, by means of the writ of *habeas corpus*, seems to me very plain. That remedy is available to every person illegally detained. The suggestion is made that, under our statute, a party detained "under a final judgment or decree of any *competent* tribunal of civil or criminal jurisdiction" is precluded from the benefit of this writ. That objection is, I think, sufficiently answered in the opinion of my learned brother, ALLEN, J. According to the terms of the statute, the court under whose final judgment the prisoner is detained must be not only a court of civil or criminal jurisdiction, but it must be *competent*. This word can have no operation unless it means competent to render such judgment. The further suggestion that, under the forty-second section of the *habeas corpus*

act. the "legality or justice" of any judgment or execution cannot be inquired into on *habeas corpus*, is met by a reference to the section immediately preceding, the forty-first, which expressly declares the right, in proceedings under that writ, to inquire into the question of *jurisdiction*; thus showing that the terms "legality and justice," as used in the forty-second section, were not intended to include questions of jurisdiction or power. If, upon a conviction for a misdemeanor, a prisoner were sentenced to be imprisoned for the statutory term and then hung, and he were detained after the expiration of the legal term for the purpose of carrying the latter part of the sentence into execution, the argument used in support of this objection would maintain that the writ of *habeas corpus* would not be effectual to liberate him. Yet the writ was decided to be effectual for that purpose by the Court of King's Bench, in an analogous case, as long ago as 1752. *Rex v. Collyer*, Sayer, 44.

For all these reasons, as well as those stated by my brother, ALLEN, J., I am of opinion that the power of the court was exhausted when it had imposed the first sentence of one year's imprisonment and \$250 fine; and that it then ceased to be competent to render any further judgment in the case. That term of imprisonment having expired, and the fine paid, the prisoner is entitled to be discharged.

All concur; MILLER, J., concurring in result.

Judgment of Supreme Court and order of Oyer and Terminer reversed, and ordered that prisoner be discharged.

MOWERS v. FETHERS, appellant.

(61 * N. Y. 34.)

Innkeeper — who is guest.

Plaintiff's stallion stood at defendant's inn certain days each week, under an agreement, made for the season, for serving mares. Plaintiff had the key to the stall and fed and cared for the horse. Defendant furnished the oats for the horse and meals for the plaintiff at a price less than the ordinary rates to travelers. *Heid*, that defendant's custody was not that of innkeeper, and that, therefore, he was not liable for the destruction of the barn and horse by fire without negligence on his part.

ACTION to recover the value of a horse, harness and wagon alleged to have been destroyed while in defendant's custody as an innkeeper. The defendant alleged and proved substantially that in 1865 he

* The cases from 61 New York were decided by the Commission of Appeals.

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entered into an agreement with the plaintiff, whereby plaintiff's horse — a stallion — was to stand at the defendant's inn certain days each week during the season, to serve such mares as should be brought; plaintiff was to have exclusive use of a designated box-stall in defendant's barn, and was to feed and care for the horse, and defendant was to furnish oats for the horse and meals for the man in charge of the horse at prices less than those ordinarily charged to travelers, and that this arrangement was for plaintiff's benefit, who made gains by the use of his stallion. The horse and other property were at defendant's barn under this agreement at the time of the loss complained of, and were destroyed by fire with the barn without defendant's fault.

The court charged the jury that the relation of guest and innkeeper was made out between plaintiff and defendant, and directed a verdict for plaintiff. The judgment thereon was affirmed by the General Term, and defendant appealed.

J. E. Dewey, for appellant.

Nathaniel C. Moak, for respondents. A landlord is an insurer of property committed to his custody by a guest. *Hulett v. Swift*, 33 N. Y. 571; *Ramaley v. Leland*, 43 id. 539, 541; *Bernstein v. Sweeney*, 33 N. Y. Supr. Ct. 275. Defendant was liable as an innkeeper for plaintiff's horse. *Washburn v. Jones*, 14 Barb. 193; *Lima v. Dwinelle*, 7 Alb. L. J. 44; *Krohn v. Sweeney*, 2 Daly, 200; *Pinkerton v. Woodward*, 33 Cal. 557; *Berk. Woolen Co. v. Proctor*, 7 Cush. 417; *Norcross v. Norcross*, 53 Me. 169; *Parker v. Flint*, 12 Mod. 255; *Mallory v. Tiv. R. R. Co.*, 39 Barb. 488; *Seymour v. Cook*, 53 id. 451; *Mudgett v. Bay State, etc.*, 1 Daly, 151; *Cayle's case*, 8 Coke, 32; *Macklin v. N. J. Stbt. Co.*, 7 Abb. (N. S.), 229; *Buddenburg v. Benner*, 1 Hilt. 84; *Van Wyck v. Howard*, 12 How. 147, 151; Bac. Abr., tit. Inns, C. 5; Bouv. Inst., § 1016; *Bennett v. Miller*, 5 T. R. 274; *McDonald v. Edgerton*, 5 Barb. 563; *Allen v. Smith*, 12 C. B. (N. S.), 636; 104 E. C. L.; *Walling v. Potter*, 9 Am. L. Reg. (N. S.), 618; *Pinkerton v. Woodward*, 33 Cal. 602; *Clute v. Wiggins*, 14 Johns. 175; *Piper v. Manny*, 21 Wend. 282; *Snyder v. Griss*, 1 Yeates, 34; *Hulett v. Swift*, 33 N. Y. 571; *Townson v. H. de G. Bank*, 6 H. & J. 47; *Mateer v. Brown*, 1 Cal. 221; *Burgess v. Clements*, 4 M. & S. 306; 1 Stark. N. P. 251; *Hawley v. Smith*, 25 Wend. 642; *Neal v. Wilcox*, 4 Jones (N. C.), 146; *Manning v. Wills*, 9 Hampt. (Tenn.) 746; *Walling v. Potter*, 35 Conn. 185.

REYNOLDS, C. An innkeeper at common law has been said to be the

keeper of a common inn for the lodging and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation. 5 Bacon's Abr., Inns, etc., 228; Story on Bailments, § 475. The person or persons undertaking this public employment were bound to take in and receive all travelers and wayfaring persons, and to entertain them for a reasonable compensation, if by any possibility they could be accommodated, and the innkeeper was bound to guard the goods of his guests with proper diligence. 5 Term R. 274; 2 Barn. & Ad. 285; 1 Carr. & K. 404; 7 Carr. & P. 213; 4 Exch. 367. The common-law rule has been generally followed by the courts in this country save so far as it has been modified by statute. The duties, rights and responsibilities of an innkeeper are in most respects kindred to those of a common carrier, but in order to enforce the strict common-law liability of an innkeeper, the technical relation of guest and innkeeper must be established, and the question is, whether it existed in the present case. I think it did not, for reasons now to be suggested.

It seems to be apparent from the nature of the duties and obligations of the keeper of a common or public inn, that he is not, in his capacity of innkeeper, bound to receive or furnish accommodations for persons desirous of exposing their commodities for sale, or bound to permit his establishment to be made a depot for the propagation of horses.

He is doubtless bound to receive and entertain a strolling pedler, and securely guard his pack of trinkets if brought *infra hospitium*, so long as he remains a mere guest. So, also, would he be bound to receive and entertain a wayfarer, incumbered with a stallion, but under no obligation as an innkeeper to allow his curtilage to be turned into an asylum for the breeding of horses. It is very manifest in this case that the sojourn of the plaintiff Eggner, with the horse, at the defendant's inn, was not that of an ordinary traveler. The purpose and object was entirely different, and the defendant, as an innkeeper, was under no common-law obligation to receive and entertain the plaintiff Eggner and his horse for such a purpose, and where he is not bound to receive and entertain the person as his guest, the strict rule of common-law liability for the preservation of his property does not obtain. The obligation to respond for injury to property depends upon his duty to receive and entertain as an innkeeper, and they must stand or fall together. *Grinnell v. Cook*, 3 Hill, 485; *Ingalsbee v. Wood*, 36 Barb. 455; S. C., 33 N. Y. 577; *Hulett v. Swift*, id. 571. The arrangement by which the plaintiff Eggner, with his horse, occupied the premises of the defendant two days in each week, was made beforehand, and was to continue during the season, for serving mares that should be brought to the inclosure. The stall that the horse

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was to occupy was selected, and some other conveniences incident to the business to be carried on were also provided for. The plaintiff Eggner was himself to groom and take care of the horse, and when occupying the stall selected for his accommodation he had it under a lock and key of his own. The price of oats for the horse and of meals for Eggner was fixed at prices less than charged ordinary travelers. Under this condition of facts it appears to me obvious that Eggner did not come for entertainment at the defendant's inn as an ordinary wayfarer, but under a special arrangement previously made. In such case the utmost limits of the defendant's liability was that of an ordinary bailee for hire.

The case of *Washburn v. Jones*, 14 Barb. 193, has no analogy to this. There the defendant was made liable for negligence in fact in the construction of the stall, by reason of which the horse received the injury, and that liability would follow if he was to be regarded merely as an ordinary bailee.

In the case at bar, I think, there should be a new trial.

LOTT, Ch. C., and GRAY, C., concur.

EARL and DWIGHT, CC., dissent.

Judgment reversed, and new trial ordered.

BARNES V. BARROW, appellant.

(61 N.Y. 39.)

Guaranty — to be strictly construed.

A. agreed to furnish B. with goods for sale on commission, and C. guaranteed that B. should account for the proceeds of the sales. The goods were furnished by a firm of which A. was a member. *Held*, that the firm could not maintain an action against C. on the guaranty without proving that he knew that the goods were to be furnished by them.

ACTION upon a guaranty. On October 20, 1869, John W. Barns, one of the plaintiffs, agreed in writing to furnish Edward Barrow flour and feed to be sold on commission, and the defendant, John Barrow, guaranteed in writing that Edward Barrow should account to Barns for the proceeds. Barns was a member of the firm of John W. Barns & Co., which firm, and not John W. Barns, furnished the flour and feed to Barrow, and now brings action on the guaranty to recover a balance due from Edward Barrow. It did not appear that either Edward Barrow or defendant knew that the goods supplied belonged to the copartnership.

The referee ordered judgment for the defendant, which was reversed by the General Term, and defendant appealed.

W. J. Wallace, for appellant.

A. L. Johnson, for respondent.

DWIGHT, C. The single question in this case is, whether, under a written contract of guaranty, purporting to be made with a particular person, a firm, of which that person is a member, can recover the value of goods supplied to the person whose solvency was guaranteed, there being no evidence that the guarantor was made acquainted with the fact that the goods were to be supplied by the firm.

On the face of this contract, it is plain that no one could act upon it, except the persons named in it. The plaintiffs maintain that they can go behind the apparent transaction and show that they supplied the goods instead of John W. Barns. This claim is not one between the person who received the consideration and the plaintiffs. Were they seeking to collect of Edward F. Barrow, the purchaser, it might be claimed that the case was simply one of an undisclosed principal in the law of agency; and that parol evidence might be offered to show that John W. Barns was acting for the firm. This is the principle of such cases as *Alexander v. Barker*, 2 Crompt. & Jer. 134; *Cothay v. Fennell*, 10 B. & C. 671, cited in the court below. In *Alexander v. Barker*, there was a loan of money direct to the defendant, which was supplied by the plaintiff in his own name, though it belonged to a firm of which he was a member. The court held that the firm might recover, as it was their money. There was no element of guarantee in the case. In *Cothay v. Fennell*, three persons agreed to be jointly interested in the purchase of goods, which was, however, made in the name of one of them; it was held that all might recover for breach of contract.

The present case differs in an essential particular from those just cited. It is a case of pure guaranty; a contract which is said to be *strictissimi juris*; and one in which the guarantor is entitled to a full disclosure of every point which would be likely to bear upon his disposition to enter into it. The consideration of the contract does not inure to him, but to another. He assumes the burden of a contract without sharing in its benefits. He has a right to prescribe the exact terms upon which he will enter into the obligation, and to insist on his discharge in case those terms are not observed. It is not a question whether he is harmed by a deviation to which he has not assented. He may plant himself upon the technical objection, this is not my contract, *non in hæc fœdera veni*. Accordingly, in the present case, he may say: "I contracted with John W. Barns, and will not be liable for supplies furnished by a firm, though he may be a member of it."

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The authorities, when carefully considered, sustain this conclusion. Mr. Burge, in his work on Suretyship, chap. 3, discusses this subject at length. He says: "The contract of suretyship is to be construed strictly; that is, the obligation is not to be extended to any other subject, *to any other person*, or to any other period of time than is expressed, or necessarily included in it. It was in the power of the person accepting the surety to have expressed, and it is his own fault if he has not included the case to which he seeks to extend the liability of the surety," p. 40. This last remark is peculiarly applicable to the case at bar, as Barns, with whom the defendant contracted, knew who the members of his firm were, and could readily have named them, if he had seen fit. In the Roman law, the rule now under consideration assumes the form of a maxim: "An agreement of guarantee made with one person cannot be extended to another person." Some of the English cases which turn upon this principle are *Lord Arlington v. Merricke*, 2 Saund. 414; *Wright v. Russell*, 2 W. Black. 934; *Myers v. Edge*, 7 T. R. 254; *Barker v. Parker*, 1 id. 287; *Simson v. Cooke*, 1 Bing. 452; *Strange v. Lee*, 3 East, 484; *Spies v. Huston*, 4 Bligh (N. S.), 215; *Dry v. Davy*, 10 Ad. & Ell. 30. The rules governing letters of credit depend upon the same doctrine. The whole subject is well illustrated by the case of *Philip v. Melville*, cited in Burge on Suretyship, p. 68. In that case, Melville recommended one Yetts to Dusie for a supply of spirits, and guaranteeing the payment. Dusie wrote on the back of the letter of credit an assurance to C. & J. Philip, plaintiffs, that, not having the article himself, he had sent Yetts with the letter of credit, on which they might rely. They having furnished the spirits sued Melville. The court held, that a letter of credit addressed to a particular person is limited to him, and that the writer must be held to have granted it in reliance on his prudence and discretion in acting upon it; that such a letter contains no general power to interpose the writer's credit, or transmit his guarantee; and that this is specially to be observed where the general terms of the letter make the personal limitation the only restraint on the responsibility of the writer. The same principle is stated in *Union Bank v. Coster*, 3 N. Y. 203; *Birckhead v. Brown*, 5 Hill, 634; S. C., 2 Den. 375; *Walsh v. Bailie*, 10 Johns. 180; *Robbins v. Bingham*, 4 id. 476; *Penoyer v. Watson*, 16 id. 100. In *Walsh v. Bailie*, A. gave a letter of credit to B., addressed to C. in Albany, requesting the latter to deliver goods to B. C., instead of delivering the goods himself, gave B. a letter to D. in Geneva, who supplied the goods. It was held that the engagement of A. to C. did not make him answerable for goods furnished by any other person, on the ground that a surety is not answerable beyond the scope of his engage-

ment. In *Penoyer v. Watson*, the facts were, that a letter of credit, in favor of A., was addressed to P. & Co. That firm having dissolved their partnership, P. acted on the letter. It was held that the guarantor was not liable.

It is conceded that none of the cases cited cover the case at bar in its precise terms. The theory on which they proceed, however, embraces it. As stated by SPENCER, J., in *Penoyer v. Watson*, the surety cannot be bound beyond the scope of his engagement. The sole question is: To what did he agree? And if he contracted with one person, as he had reason to suppose, no other person can be substituted in the place of the apparent contractee. On like grounds no person can be added to or subtracted from the apparent number. The words of the written instrument point out the person with whom he contracted and measure his liability, unless it be made to appear affirmatively, by legitimate evidence, that the guarantor intended to embrace others.

The court below, in holding the surety liable, laid stress on an extract from a section in Story on Partnership, the effect of which, we think, was misapprehended. The passage is as follows: "If a contract of guarantee should be entered into apparently with one partner, but in reality it should be intended for the indemnity of the firm, for advances to be made by the firm, an action might be maintained by all the partners, as upon a joint contract therewith, although the written papers containing the guarantee should be addressed to one partner, and he alone should conduct the negotiation;" citing *Garrett v. Handley*, 3 B. & C. 463; S. C., 4 id. 664. It will be observed Justice STORY makes it a part of his supposition that the guarantee is *intended* for the indemnity of the firm, though apparently entered into toward one person. In the case cited by him evidence was produced at the trial which established that the guarantee was intended to be given for the joint benefit of the firm and not for that of the member solely to whom it was addressed. This evidence of special facts took the case out of the general rule, which would have otherwise governed it.

The case should be stated with some particularity. An action was first brought by Garrett, alone, against Handley. It appeared at the trial that the loan, on account of which the guarantee was given, did not belong to Garrett solely, but to himself in conjunction with two partners, and he was nonsuited. A second action was brought by the partners, though the guarantee was addressed to Garrett alone. The plaintiffs, to show right of action, produced a correspondence between Bodenham, one of the partners, and the defendant, for the purpose of showing that the guarantee, though in terms given to Garrett, was intended for the

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benefit of the firm. On the part of the defendant it was urged, first, that the correspondence did not prove that the guarantee was intended for the benefit of the firm ; and second, assuming that it did, still, that the action ought to have been brought in the name of Garrett, to whom the guarantee was in terms given. The court directed the case to stand over in order to read the correspondence. At a later day the judges said that they had perused the correspondence, and thought that it sufficiently appeared that the guarantee was intended for the benefit of the firm and not for Garrett alone, and that being so, they were of opinion that the action was properly brought in the name of the parties for whose benefit the contract was entered into. The reporter states the point of the decision to be, that an action may be maintained by the several partners of a firm, upon a guarantee given to one of them, if there be evidence that it was given for the benefit of all. The same principle was applied to the decision of *Bateman v. Phillips*, 15 East, 272. In that case a letter of guarantee was addressed to an attorney, and parol evidence was offered to show that it was intended for his client. Lord ELLENBOROUGH said that the parol evidence did not go to extend the terms of the agreement in writing ; it only went to show that the letter was addressed to him as the attorney for the plaintiff and not as the principal and creditor of the debtor. These cases show in the clearest manner that the mere addressing of a guarantee to one, in the absence of parol evidence of intention, will not permit another to recover upon it.

That this was the interpretation put upon these cases by Judge STORY is plainly shown by the language used by him in section 247 of the work already cited, where he remarks : " It never can be said with truth or justice that a guarantee or suretyship for advances to be made by A., B. & C. does properly extend to any advances made by A. or B., or by A., B. & D. ; and therefore the guarantor or surety may with all good faith and correctness say *non in hæc fœdera veni*," citing, with approval, *Strange v. Lee*, 3 East, 484, 490. In that case the guarantee reciting that B. intended to open a bank account with C. D. & E., as his bankers, was conditioned for payment to *them* of all sums from time to time advanced to B. at the said banking-house. It was held that on C.'s death such obligation ceased, and did not cover future advances made after another partner was taken in. Lord ELLENBOROUGH said : " The court will no doubt construe the words of the obligation according to the intent of the parties, to be collected from them ; but the question is, what that intent was. The defendant's obligation is to pay all sums due to *them* on no count of their advances to Blyth. Now, who are ' them ' but the persons before named ? * * * The words will admit of no other meaning

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* * * We are desired to construe our obligation to be answerable for money due to *them* (certain partners having been before named), to mean money due to any part of them; a construction which would be contrary to the words of the instrument." Pp. 490, 491. The only case appearing to lend color to the plaintiff's claim is *Walton v. Dodson*, 8 Carr. & Payne, 162. The case is briefly reported at *nisi prius*, and was decided shortly after *Garrett v. Handley*, *supra*. It is probably not inconsistent with it, but if so must be disregarded.

In the case at bar the defendant agreed that Edward F. Barrow should account to John W. Barns for goods received, and should sell on commission for him, and be accountable for the proceeds, after deducting commissions to be allowed him by Barns. It is not possible, on any principle of construction established by the commentators and the cases cited, to add to the name of John W. Barns those of William and Charles Barns, his copartners, it not being made to appear that the defendant knew, at the time of the execution of the contract, that it was entered into by John W. Barns, not for himself merely but also for his copartners.

The order of the General Term should be reversed and the judgment entered upon the report of the referee should be affirmed, with costs.

All concur.

Order reversed, and judgment accordingly.

 MITCHELL, appellant, v. REED

(61 N. Y. 123.)

Partnership — relation of partners — renewal of partnership lease to one partner.

A partnership formed to continue until a certain date leased premises for a term to expire at the same date, and made valuable improvements thereon. During the term one partner, without the knowledge of the others, took a renewal of the lease in his own name for a term to begin at the expiration of the partnership term. *Held*, that the new lease inured to the benefit of the firm, and that the partner was in equity a trustee of the lease for the partnership.

ACTION to have a certain lease declared to have been taken for the benefit of a partnership, and to have it adjudged that the defendant held it as trustee for the firm.

The plaintiffs and defendant entered into a copartnership which was by its terms to expire May 1st, 1871, for the purpose of carrying on the Hoffman House in New York. They procured a lease of said house, which was also to terminate May 1st, 1871. The firm spent large sums of

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money in improving the leased property, and had considerably increased the rental value thereof. In 1869, the defendant, without the knowledge of his copartners, procured a new lease of the Hoffman House in his own name for a term commencing May 1st, 1871. The court on the trial found that the defendant was the sole owner of the lease, and that the plaintiff had no interest or right in it, and ordered judgment for the defendant. This judgment was affirmed by the General Term (61 Barb 310), and plaintiff appealed.

A. J. Vanderpoel and J. E. Burrill, for appellant.

John K. Porter and Willard O. Bartlett, for respondent.

EARL, C. The relation of partners with each other is one of trust and confidence. Each is the general agent of the firm, and is bound to act in entire good faith to the other. The functions, rights and duties of partners in a great measure comprehend those both of trustees and agents, and the general rules of law applicable to such characters are applicable to them. Neither partner can, in the business and affairs of the firm, clandestinely stipulate for a private advantage to himself; he can neither sell to nor buy from the firm at a concealed profit to himself. Every advantage which he can obtain in the business of the firm must inure to the benefit of the firm. These principles are elementary, and are not contested. Story, §§ 174, 175; Collyer, 181, 182. It has been frequently held that when one partner obtains the renewal of a partnership lease secretly, in his own name, he will be held a trustee for the firm as to the renewed lease. It is conceded that this is the rule where the partnership is for a limited term, and either partner takes a lease commencing within the term; but the contention is that the rule does not apply where the lease thus taken is for a term to commence after the expiration of the partnership by its own limitation, and whether this contention is well founded, is one of the grave questions to be determined upon this appeal.

It is not necessary, in maintaining the right of the plaintiff in this case, to hold that in all cases a lease thus taken shall inure to the benefit of the firm, but whether, upon the facts of this case, these leases ought to inure to the benefit of this firm. I will briefly allude to some of the prominent features of this case. These parties had been partners for some years; they were equal in dignity, although their interests differed. The plaintiff was not a mere subordinate in the firm, but so far as appears, just as important and efficient in its affairs as the defendant. They pro-

cured the exclusive control of the leases of the property, to terminate May 1, 1871, and their partnership was to terminate on the same day. They expended many thousand dollars in fitting up the premises, a portion thereof after the new leases were obtained, and they expended a very large sum in furnishing them. By their joint skill and influence they built up a very large and profitable business, which largely enhanced the rental value of the premises. More than two years before the expiration of their leases and of their partnership, the defendant secretly procured, at an increased rent, in his own name, the new leases, which are of great value. Although the plaintiff was in daily intercourse with the defendant, he knew nothing of these leases for about a year after they had been obtained. There is no proof that the lessors would not have leased to the firm as readily as to the defendant alone. The permanent fixtures, by the terms of the leases at their expiration, belonged to the lessors. But the movable fixtures and furniture were worth vastly more to be kept and used in the hotel than to be removed elsewhere. Upon these facts I can entertain no doubt, both upon principle and authority, that these leases should be held to inure to the benefit of the firm. If the defendant can hold these leases, he could have held them if he had secretly obtained them immediately after the partnership commenced, and had concealed the fact from the plaintiff during the whole term. There would thus have been, during the whole term, in making permanent improvements and in furnishing the hotel, a conflict between his duty to the firm and his self-interest. Large investments and extensive furnishing would add to the value of his lease, and defendant would be under constant temptation to make them. While he might not yield to the temptation, and while proof might show that he had not yielded, the law will not allow a trustee thus situated to be thus tempted, and therefore disables him from making a contract for his own benefit. *Terwilliger v. Brown*, 44 N. Y. 237, and cases cited. It matters not that the court at Special Term found upon the evidence that the improvements were judicious and prudent for the purposes of the old term. The plaintiff was entitled to the unbiased judgment of the defendant as to such improvements, uninfluenced by his private and separate interest. But, further, the parties owned together a large amount of hotel property in the form of furniture and supplies, considerably exceeding, as I infer, \$100,000 in value. Assuming that the partnership was not to be continued after the 1st day of May, 1871, this property was to be sold, or in some way disposed of for the benefit of the firm, and each partner owed a duty to the firm to dispose of it to the best advantage. Neither could, without the violation of his duty to the firm, place the property in such a situation

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that it would be sacrificed, or that he could purchase it for his separate benefit, at a great profit. Much of this property, such as mirrors, carpets, etc., was fitted for use in this hotel, and it is quite manifest that all of it would sell better with a lease of the hotel, than it would to be removed therefrom. It is clear that one or both of these parties could obtain advantageous leases of the hotel for a term of years, and hence, if the parties had determined to dissolve their partnership, it would have been a measure of ordinary prudence to have obtained the leases and transferred the property with the leases as the only mode of realizing its value. This was defeated by the act of the defendant, if he is allowed to hold these leases, and thus place himself in a position where the property must be largely sacrificed or purchased by himself at a great advantage. This the law will not tolerate. The language of Lord ELDON, in *Featherstonhaugh v. Fenwick*, 17 Ves. 311, a case in many respects resembling this, is quite in point. He says: "If they (the defendants) can hold this lease, and the partnership stock is not brought to sale, they are by no means on equal terms. The stock cannot be of equal value to the plaintiff, who was to carry it away and seek some place in which to put it, as to the defendants who were to continue it in the place where the trade was already established, and if the stock was sold the same construction would give them an advantage over the bidders. In effect they would have secured the good-will of the trade to themselves in exclusion of their partner." For these reasons, independently of the consideration that the leases themselves had a value to which the firm was entitled upon other grounds and upon authorities to be hereafter cited, the plaintiff, who commenced his suit about one year before the term of the partnership expired, was upon undisputed principles and authorities applicable to all trustees and persons holding a fiduciary relation to others, entitled to the relief he prayed for.

It has long been settled by adjudications, that generally when one partner obtains the renewal of a partnership lease secretly, in his own name, he will be held a trustee for the firm, in the renewed lease, and when the rule is otherwise applicable, it matters not that the new lease is upon different terms from the old one, or for a larger rent, or that the lessor would not have leased to the firm. The law recognizes the renewal of a lease as a reasonable expectancy of the tenants in possession, and in many cases protects this expectancy as a thing of value. I will briefly notice a few of the cases upon this subject. In *Holridge v. Gillespie*, 2 Johns. Ch. 30, Chancellor KENT says: "It is a general principle pervading the cases, that if a mortgagee, executor, trustee, tenant for life etc., who has a limited interest, gets an advantage by being in pos-

session, 'or behind the back' of the party interested in the subject, or by some contrivance or fraud, he shall not retain the same for his own benefit, but hold it in trust." That was a case where a lease was assigned as security, and the assignee surrendered it to the lessor and took a new lease for an extended term of years. In *Phyfe v. Wardell*, 5 Paige, 268, Chancellor WALWORTH lays down the general rule, "that if a person who has a particular or special interest in a lease, obtains a renewal thereof from the circumstances of his being in possession as tenant, or from having such particular interest, the renewed lease is in equity considered as a mere continuance of the original lease, subject to the additional charges upon the renewal, for the purpose of protecting the equitable rights of all parties who had any interest, either legal or equitable, in the old lease." That case was followed in *Gibbes v. Jenkins*, 3 Sandf. Ch. 131, where it was held that one purchasing a leasehold which was subject to a mortgage and contained no covenant of renewal, could not escape the lien of the mortgage by suffering the lease to expire and afterward obtaining a new lease of the premises; that the new lease in such case, though not a renewal, was a continuance of the original lease for the purpose of protecting the rights of the parties interested in the original lease, both legal and equitable. In these two cases church leases were involved, and some stress was laid upon that fact, as the continuance of such leases was expected as a matter of course, without any covenant of renewal. But the fact that they were church leases could make no real difference in the principle upon which the decisions were based. The fact that a renewal or continuance of a lease is more or less certain can make no difference with the principle; that springs from the fact that the party obtained the new lease from the position he occupied, being in possession and having the good-will which accompanies that, or being connected with the old lease in some way, and thus enabled to take an inequitable advantage of other parties also interested, to whom he owed some duty.

In *Struthers v. Pearce*, 51 N. Y. 357, it was held that when, during the existence of a continuing copartnership of undetermined duration, three or four copartners, without the knowledge of the other, obtained a new lease in their own names, of premises leased and used by the firm, the same became partnership property, and upon dissolution the other partner was entitled to his proportion of the value. In that case the defendants intended to dissolve the copartnership as early as August, and gave written notice on the 18th day of September, 1865, for the dissolution on the thirty-first day of December, following. On the eleventh day of September, the defendants secretly obtained a new lease, in their

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own names, of the same premises, for a term of five years, to commence May 1, 1866. I think that case is fairly decisive of this. It is true that a period for a dissolution of the partnership had not been fixed when the new lease was taken, but negotiations were pending for its dissolution, and a few days after the new lease was taken, a time for its dissolution was fixed by a written notice. But it can make no difference that the partnership might have been continued by the parties until after the new term commenced. So it might here, if the parties had so willed. There they had the right to dissolve it at any time. The principle which lies at the foundation of the decision of that and all similar cases must be the one above stated, that the defendants in possession took advantage of their position to procure the new lease, and thus deprived the plaintiff of a benefit to which he, with them, was equally entitled. In a note to *Moody v. Matthews*, 17 Ves. 185 (Sumner's ed.), the learned editor says, as a deduction from adjudged cases, that "with a possible exception in favor of a *bona fide* purchaser, it seems to be an universal rule that no one who is in possession of a lease or a particular interest in a lease, which lease is affected with any sort of equity in behalf of third persons, can renew the same for his own use only; but such renewal must be construed as a graft upon the old stock." In *Clements v. Hall*, 2 De G. & J. 173, where one partner in a mining partnership died in 1847, and the surviving partner thereafter worked the mine without a new lease thereof, claiming to do so for his own benefit, until 1850, when the lessor gave him notice to quit in March, 1851, when he entered into new negotiations with the lessor for a new lease, and obtained one of the greater part of the mine, on terms much more burdensome than those of the old tenancy, it was held that those who claimed under the will of the deceased partner were entitled to a share of the benefit of the new lease. In *Clegg v. Fishwick*, 1 McN. & G. 294, one of several partners working a mine under a lease died, and the firm business was thereafter carried on for several years between the surviving partners and the plaintiff, widow of the deceased partner. Finally, the old lease expired, and some of the partners took a new lease of the mine without the privity of the plaintiff. It was held that the estate of the deceased partner was interested in the new lease. The lord chancellor says: "The old lease was the foundation of the new lease, the tenant's right of renewal arising out of the old lease giving the partners the benefit of this new lease; at least the law assumes it to be so. Without saying at all what circumstances there may be to interfere with that ordinary right, we know that the rule of equity is that parties interested jointly with others in a lease cannot take to themselves the benefit of a renewal to the exclusion of the other

parties interested with them." In *Clegg v. Edmondson*, 8 De G., McN. & G. 787, the managing partners of a mining partnership at will gave notice of dissolution to the rest, and intimated their intention, after the dissolution, to apply for a new lease for their own exclusive benefit, and did so and obtained a lease, and it was held to inure to the benefit of the partnership. See, also, the leading cases of *Featherstonhaugh v. Fenwick*, 17 Ves. 298, and *Keeck v. Sandford*, 2 Eq. Cas. Abr. 741, and notes to the latter case in 1 Leading Cases in Equity, 32, where the whole doctrine is discussed, and conclusion reached in harmony with the views above expressed. I therefore conclude that it makes no difference that these leases were obtained for a term to commence after the partnership, by its own limitation, was to terminate. I can find no authority holding that it does, and there is no principle sustaining the distinction claimed. The defendant was in possession as a member of the firm, and the firm owned the good-will for a renewal, which ordinarily attaches to the possession. By his occupancy, and the payment of the rent, he was brought into intimate relations with the lessors; he became well acquainted with the value of the premises, and he took advantage of his position, during the partnership, secretly to obtain the new leases. He must hold them for the firm.

I am therefore of opinion that the judgment should be reversed and new trial granted, costs to abide the event.

DWIGHT, C. The question at issue in this case is, whether a member of a commercial partnership, during its continuance, and without the consent or knowledge of his associate, can take a renewal of a lease of property used in the business, in his own name and for his own benefit, the partnership having a definite termination, and the renewal lease commencing at its expiration.

The general power of a partner to take a lease of such property for his own benefit must be considered as settled in this court by the decision in *Struthers v. Pearce*, 51 N. Y. 357. In that case the lease was taken during the existence of the partnership, which was of indefinite duration. No notice had been given of its termination when this lease was taken. The facts presented the case of a lease taken during the existence of the partnership, and to begin in enjoyment during that time. The court expressly distinguished it from the present case, which had then been decided in the Supreme Court. P. 362.

The only point now open for discussion is, whether the fact that when Read took the renewal of the lease the partnership had a precise limit, and was to terminate before the lease commenced, is material. Before

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considering that point, it may fairly be claimed that this case comes within the precise decision in *Struthers v. Pearce*, on a ground not mentioned in the argument. Read, though his lease was not to commence in possession until after the expiration of the original lease, acquired an immediate interest by way of an *interesse termini*. This precise point was decided in *Smith v. Day*, 2 M. & W. 684, 699; 2 Platt on Leases, 60. This, it is true, is not an estate, but a right. Still it is the subject of grant before entry. 1 Steph. Com. 268; Burton's Real Property, 18. pl. 61; 2 Crabb on Real Property, 227. If the partnership had acquired this *interesse termini*, it might, as the facts of the case show, have been disposed of for a large sum of money. If the doctrine of *Struthers v. Pearce* establishes that the partner cannot acquire a lease in his own behalf, to commence while the partnership lasts, by parity of reasoning he cannot obtain an *interesse termini* under the same circumstances.

If, however, this view is not correct, the main question must be disposed of. Can a partner take a lease for himself, to commence in possession after the partnership has expired? In order to settle this point it is essential to give the subject a more full examination than was requisite in *Struthers v. Pearce*, and to consider more at large the principles on which this branch of the law rests. It grows out of the relation of trust and confidence between partners, and is a branch of the rule that a trustee cannot profit from the estate for which he acts. It largely has its roots in a principle of public policy, as shown in one of the early decisions. *Keech v. Sandford*, Sel. Ca. in Chan. 61; *Griffin v. Griffin*, 1 S. & L. 352, per Lord REDESDALE. The general rule is so well settled that it would be a waste of time to refer to authorities. The text-writers on the law of partnership, without exception, assert the applicability of this rule of law to partnership transactions. Lindley on Part. 495; Story on Part., §§ 174, 175; Pars. on Part., §§ 224-226; Collyer on Part., §§ 281, 282.

The special rule that a trustee cannot take, for his own benefit, a renewal of a lease which he holds in trust is enforced in a great number of cases. The principle on which it rests is nowhere more fully or clearly stated than in the argument of Sir FRANCIS HARGRAVE in *Lee v. Vernon*, 5 Brown's Parl. Cases, 10th Eng. ed., 1803. Although the passage is somewhat long, it is quoted as shedding much light on a subject, the principle of which has, in course of time, become somewhat obscure. He said: "It has long been an established practice to consider those who are in possession of lands under leases for lives or years as having an interest beyond the subsisting term, and this interest is usually termed the tenant right of renewal, which, though according to language and

ideas strictly legal, is not any certain, or even contingent estate, but only a *chance*, there being no means of compelling a renewal, yet is so adverted to in all transactions relative to leasehold property, that it influences the price in sales, and is often an inducement to accept of it in mortgages and settlements. This observation is more especially applicable to leases from the crown, the church, colleges, or other corporations, and, indeed, from private persons, where the tenure is of ancient date. * * * This 'tenant right' of renewal, as it is termed; however imperfect or contingent in its nature, being still a thing of value, ought to be protected by the courts of justice, and when those who are entitled to its incidental advantages, whether by purchase or other derivation, are disappointed of them by fraud, imposition, misrepresentation, or unfair practice of any kind, it is fit and reasonable that this injury should have redress. Accordingly, courts of equity have so far recognized the tenant right of renewal as frequently to interpose in its favor by decreeing that new or *reversionary* leases gained by means or supposition of the tenant right of renewal, should be for the benefit of the same persons as were interested in the ancient lease, and those who procured such new leases, and were legally possessed of them, should be trustees for that purpose. There is a great variety of authorities on this head, but the cases which have hitherto occurred have been principally of two kinds; some being cases of persons not having any beneficial interest in the old lease, as guardians and executors, and others being cases of persons having only partial and limited interests, as tenants for life, mortgagees and mortgagors, and in cases of both descriptions, those who have procured a new lease in such situations have been uniformly declared trustees for the persons beneficially interested in the ancient lease, either wholly or in part; according to the particular circumstances, the court ever presuming that the new lease was obtained by means of a *connection with* and a *reference to* the interest in the ancient one, without in the least regarding whether the persons renewing intended to act as trustees, or for their own emolument."

From this exposition, so luminous and judicial in its tone, which is fully sustained by the authorities, it is clear that the rule under consideration is not confined to crown, church or college leases; but embraces those of every kind. The same principle appertains to all. The *cestui que trust* has a right to the *chance* of renewal. Though this is termed a "tenant right" as between the lessee and the landlord, that is a mere phrase. It is a hope, an expectation, rather than a right. Such as it is, the trustee shall not take it to himself, but if it results in any substantial benefit he shall hold it for his beneficiary. *Phyfe v. Wardell*, 5 Paige, 268; *Bennett v. Van Syckel*, 4 Duer, 462; *Gibbes v. Jenkins*, 3 Sandf.

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Ch. 130; *Davoue v. Flanning*, 2 Johns. Ch. 252; *Armour v. Alexander*, 10 Paige, 572; *Dickinson v. Codwise*, 1 Sandf. Ch. 226. Some of these were instances of church or other corporation leases, and others were not. In no case has it been held that the rule is confined to these, as it certainly cannot be on principle.

The whole doctrine is extended to the case of partners in *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Clegg v. Edmondson*, 8 De G., M. & G. 787; *Clements v. Hall*, 2 De G. & J. 173; *Clegg v. Fishwick*, 1 McN. & G. 294; *Struthers v. Pierce*, *supra*.

The principle cannot depend on the fact whether the lease is made to begin during the continuance of the partnership or at its close. Once admit the general principle, and it must result in this. *While the relation lasts*, one partner cannot clandestinely and exclusively profit by the trust relation. There may, perhaps, be cases where the act is openly done by the trustee and acquiesced in by the beneficiary that would admit of different considerations. It is not now necessary to decide that in no case can a partner take a lease for his own benefit. What is now to be decided is, whether he can do so behind the back of his associate and without his consent. The bad consequences of making any such distinction as the defendant seeks to maintain in the present case is easily shown by a reference to the relation of a guardian and his ward. A guardian, we may suppose, holds a lease in his official character which is to expire at his ward's majority. While the *relation* of guardian and ward exists, he takes a lease to himself to commence at the termination of the existing lease. Could that be sustained? Has he not profited by the trust relation? When he takes a lease to himself, can a tenable distinction be taken between one commencing immediately, and one beginning at a future day, even though that day be postponed until the trust relation expires? The sound rule is, that he cannot make any profit to himself from a secret transaction *initiated* while the relation of trustee and *cestui que trust* exists, no matter when it springs into active operation. It must never be forgotten that, on general principles of the law of contracts, his *right* to the lease, as between him and his landlord, commences as soon as he has made his agreement for it. This is an immediate subject of sale, and if the trustee can hold it, he will be allowed to profit by the trust relation which, as has been shown, he cannot do. The *cestui que trust* may accordingly say: "All the value of this lease you hold in trust for me. Grant that it is not yet an estate but only a right — make it over to me in the condition in which you hold it." While no case has been found presenting the precise facts in the case at bar, the principles which should govern it may be derived from the result in

Featherstonhaugh v. Fenwick, supra ; *Olegg v. Edmondson* and *Clegg v. Fishwick, supra*.

In the first of these cases, the partnership was for an indefinite period, and might be dissolved at the pleasure of either party, on notice. It was dissolved November 22d, 1804, the day on which the lease expired. Two of the partners, without communication with the plaintiff, had applied for a renewal of the lease, and obtained it before giving notice of the dissolution of the partnership. The new lease was to run for eight years from the expiration of the old one. On October 19th, they gave notice to dissolve the partnership. The court held that the new lease belonged to the partnership, and was assets of the firm. Much stress was laid on the fact that the transaction was a clandestine one, and the court thought if notice had been given the case might have admitted of different consideration. The case is not in all respects parallel in its facts with the case at bar, for at the time the lease was taken, the period for the termination of the partnership had not been fixed, and only became subsequently ascertained by notice.

In the case of *Clegg v. Edmondson*, which was also an instance of a partnership to be dissolved at the pleasure of the parties, the effect of a notice to dissolve, preceding the execution of the renewal lease, came before the court. In that case, five managing partners had determined to dissolve their partnership, and had communicated their intent in June, 1846, and their determination to take a renewal to themselves. To this two other partners objected, claiming that the renewal should be for the benefit of all. Formal notice of dissolution was given in July, to take effect on September 30th. On the succeeding 11th of December, a new lease was executed for twenty-one years to the managing partners, to take effect from September 29, 1846. The defendants endeavored to distinguish this case from that of *Featherstonhaugh v. Fenwick*, on the ground of the openness and fairness of the transaction. The court, however, held that the mere communication of an intent on the part of the managing partners to apply for a lease for their own benefit was not sufficient to give them an exclusive right to it. This case, on the point of time, is stronger than the case at bar, for the new lease was taken after the partnership was dissolved, though some stress was laid upon a point which does not appear here, that the act was that of managing partners.

On principle, in many cases it is of but little consequence whether the partnership is dissolved or not before the renewal, since, if the former partners become tenants in common, the result is the same. *Clements v. Hall*, 2 De G. & J. 173 ; *Van Horne v. Fonda*, 5 Johns. Ch. 388 ; *Baker*

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v. *Whiting*, 3 Sumn. 475, 495. The case of *Clegg v. Fishwick* is still nearer to the one under consideration. In this instance, the renewal lease was obtained during the existence of the partnership, and the lease commenced at its expiration. This lease was declared to be held in trust for the firm.

Without further collation of authorities, the fair deductions from the principles on which they rest may be summed up as follows :

1. A trustee holding a lease, whether corporate or individual, holds the renewal as a trustee, and as he held the original lease.

2. This does not depend upon any right which the *cestui que trust* has to the renewal, but upon the theory that the new lease is, in technical terms, a "graft" upon the old one ; and that the trustee "had a facility," by means of his relation to the estate, for obtaining the renewal, from which he shall not personally profit.

3. This doctrine extends to commercial partnerships, and one of several partners cannot, while a partnership continues, take a renewal lease clandestinely, or "behind the backs" of his associates, for his own benefit. It is not material that the landlord would not have granted the new lease to the other partners, or to the firm.

4 It is of no consequence whether the partnership is for a definite or an indefinite period. The disability to take the lease for individual profit grows out of the partnership relation. While that lasts, the renewal cannot be taken for individual purposes, even though the lease does not commence until after the expiration of the partnership.

5. It cannot necessarily be assumed that the renewal can be taken by an individual member of the firm, even after dissolution. The former partners may still be tenants in common ; or there may be other reasons, of a fiduciary nature, why the transaction cannot be entered into.

The authorities cited on behalf of the defendant do not disprove these conclusions.

In *Lee v. Vernon*, *supra*, there was no trust. The question arose between a stranger to the lease and the claimant. The point made by the plaintiff was, that the "tenant right" of renewal had become strictly a right, so that even a stranger could not take a renewal and hold it for his own benefit. It was an extraordinary claim, having no foundation in principle, and was rejected.

In *Van Dyke v. Jackson*, 1 E. D. Smith, 419, the party had made a special contract with his partner to abandon the *place* where the business was carried on. The case turned on the special contract to leave the business in the hands of the other party.

Musselman's Appeal, 62 Penn. St. 81, does not raise the question. It

was not sought there to charge a partner with the value of a renewal lease which he had taken to himself during the existence of the partnership, but rather with that of the good-will as it existed after the partnership was dissolved. In fact, the place where the business was carried on was sold for the benefit of the firm, and it was held, in substance, that the good-will had been realized in the enhanced value of the property sold.

It is said, in the present case, that Read was not authorized, by the articles of partnership, to contract for Mitchell after the expiration of the firm; and that, therefore, Mitchell cannot take advantage from the renewal lease. The answer is, that he made the contract while the firm was in existence, and Mitchell may adopt and ratify it. The objection also proves too much, as it applies to all the cases in which the partner, acting clandestinely, has been declared a trustee.

In *Phillips v. Reeder*, 18 N. J. Eq. 95, one of the partners, R., prior to the partnership, owned the lease, exclusively, of certain stone quarries. He entered into a partnership with P. for three years, and so much longer as R. should continue lessee of the quarries. In the lease there was a covenant of renewal at the option of R. He having declined to renew, it was held that the partnership expired; or in other words, that R. was under no obligation to renew, and thus to continue the partnership. There could be no pretense in this case that the doctrine under review applied, since the original lease did not itself belong to the firm. It was the private property of one of the partners, which he was under no obligation to preserve for the firm's benefit.

In *Achenson v. Fair*, 3 Dr. & War. 512, the point decided was, that the doctrine was not to be extended to *additional* lands purchased by trustee; in other words, the rule was fully recognized, but nothing was to be governed by it except that which could be fairly regarded as a graft on the former lease.

In *Nesbitt v. Tredennick*, 1 Ball & B. 29, 48, a mortgagee, not in possession, obtained a renewal, the original lease having been forfeited, both in law and equity, for non-payment of rent. Here there was no violation of trust. The rule under discussion was fully recognized, but its application to the existing case denied. The court said: "In all the cases upon this subject, either the party by being in possession obtained the renewal, or it was done behind the back, or by some contrivance in fraud of those who were interested in the old lease; and there was either a remnant of the old lease, or a tenant right of renewal on which a new lease could be engrafted." There could be no plainer recognition of the general principle maintained by the plaintiff.

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In *Maunsell v. O'Brien*, 1 Jones' Exch. 184, the facts were that there was an under-tenant who took a new lease from the original landlord without advising his own immediate landlord. The court held that there was no fiduciary relation between these parties. The principle was fully admitted, but the facts did not raise a case for its application. JOY, C. B., said: "It is admitted that there is no authority which can be produced where such a lease as the present has been declared to be a trust; and that we are now called upon *to go further than any decision has ever gone before*, and to make an authority for future decisions. We are called upon to do this on what are called the principles of a court of equity; namely, that where a person is clothed with a fiduciary character and in that character becomes possessed of an interest in land, held under a determinable lease, any acquisition by him of a new interest in those lands is a continuation of the old lease, and a "graft" upon it. This, however, is the first time that I have heard it asserted that if an under-tenant obtains a lease of his lands from the head landlord without consulting his own immediate landlord, that lease is a trust for his immediate landlord, because that person had a tenant right of renewal. *But there is no fiduciary character imposed on an under-tenant*, in reference to his landlord, by the creation of the relation of landlord and tenant which would entitle the plaintiff to the relief he seeks, on the ground of his having a tenant right of renewal. A *cestui que trust* is entitled to the benefit of a new lease, obtained by a trustee by means of a tenant right of renewal, which the latter became entitled to as trustee, but there is no such person in the present case." This language plainly shows that the court was but following in the wake of *Lee v. Vernon*; and holding that the doctrine of tenant right of renewal, and that the new lease is a graft on the old stock, are not to be extended to strangers, but confined to persons acting in a fiduciary character.

The only other case that will be noticed is *Anderson v. Lemon*, 8 N. Y. 236, which holds, that one partner may in good faith purchase and hold, for his own use, the *reversion* of real estate occupied by the copartnership, under a lease for years, with the qualification that if he secretly makes such purchase in his own name while the other partner with his concurrence is negotiating with the owner to obtain the property for the use of the firm, the purchaser will be declared a trustee.

This decision carefully admits the general doctrine, but considers it not applicable to the case where one of the partners purchases in good faith the landlord's interest as distinguished from taking a new lease. It is simply a case of an exception to a general rule. It can scarcely be considered as a decision in favor of a partner's right to purchase, since

he was, under the circumstances, a trustee. Should the question be distinctly presented, it will deserve consideration whether the view in *Anderson v. Lemon*, that one partner may even in good faith buy the reversion for himself, is correct. There is great cogency in the remarks of Sir WILLIAM GRANT, that the partner may in this way intercept and cut off the chance of future renewals and consequently make use of his situation to prejudice the interests of his associates. *Randall v. Russell*, 3 Meriv. 190, 197. There appears to be no direct decision allowing the partner thus to purchase, and the right to do so is treated as doubtful by approved text-writers. 1 Lead. Cas. Eq. (3d Am. ed.) pp. 43, 44, marg. paging.

The application of the principles discussed in this opinion to the case at bar is obvious.

The plaintiff and defendant were owners, as partners, of a lease of premises in the city of New York, on which a hotel business was carried on, yielding a large profit. These consisted of Nos. 1111, 1113, 1115 Broadway, and Nos. 1 and 3 West Twenty-fourth street. The leases of the Twenty-fourth street property were made directly to them, November 17th, 1866. The Broadway property, through a series of transactions not necessary to be detailed, became vested, according to the fair construction of the various agreements respecting it, in the partnership. The leases expired on the same day, May 1st, 1871, when the partnership terminated. While the partnership continued, both parties thought it necessary to provide a place for a bar room, and with this view the premises No. 3 West Twenty-fourth street were connected with the rear of the premises fronting on Broadway, known as the "Hoffman House," and the first story fitted up and used for that purpose. A considerable expenditure was made with this view, and large profits were realized, as the course taken was judicious. While all of the leases owned by the firm were still in existence, viz., April 20th, 1869, and on January 21st, 1869, the owners of the hotel property made leases to the defendant to commence from May 1st, 1871, and to continue as to part of the property for five years, and as to another portion for ten years from that date, at specified rents. The leases were obtained by Read without notice to the plaintiff, and he now claims that they are his exclusive property. They are of great value, and the hotel at the commencement of the action, March, 1870, was still in operation. The furniture, fixtures, stock, etc., were valuable, and the business carried on was profitable.

The case has in it every element of the equity which has been already considered. The partnership is undisputed; the leases were in existence

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when the renewal was made. The act of renewal was clandestine, or occurred "behind the back of the plaintiff. It took place while the partnership was in force. The right to renewal was immediate and vested in Reed during the partnership continuance. The property belonging to the firm, and which will be prejudiced by the prospect of disposing of it at a sacrifice at the close of the existing lease, is large and valuable.

Common justice and a due regard to rules of public policy demand that the renewal list should be declared to belong to the firm, and that the defendant should be required to account to the plaintiff for his portion of its value. The clauses in the leases to Reed that there shall be no assignment without the consent of the landlord do not stand in the way of the plaintiff's relief. This does not consist in an assignment in the ordinary sense of that term. On the contrary, the ground of relief is that the defendant acted inequitably when he entered into the contract; that he must therefore be considered as a trustee, while the assignment to the firm simply follows as an incident to the giving complete effect to the trust relation declared by the court to exist between the parties.

Featherstonhaugh v. Fenwick, supra.

The judgment must be reversed, and a new trial ordered.

All concur; REYNOLDS, C., not sitting.

Judgment reversed.

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(61 N. Y. 178.)

Contractor and contractee — respondeat superior.

A railroad company let by contract the entire work of constructing its road. The contractor sublet a part of the work. Through the negligence of men employed by the sub-contractor in performing the work, stones and rocks were thrown by a blast upon plaintiff's adjoining property, injuring it. *Held*, that the railroad company was not liable therefor.

ACTION to recover damages for injuries to plaintiff's property occasioned by blasting rocks in the construction of defendant's railroad.

The material facts were as follows. The defendant was duly organized and authorized to construct its road. In April, 1870, it made a contract with one Decker to construct the entire road for a gross sum to be paid to him. The contract contained this clause: "The contractor shall

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be responsible for all damages done to premises through which the line of said railroad runs, in consequence of leaving gates or fences open ; and, also, for all depredations on wood fences or other property by workmen in his employ, or by blasting rocks so as to damage buildings or other property. The amount of any damages resulting therefrom may be paid by the company, and deducted from any amount which may become due said contractor." Decker sub-let some of the work, and men employed by the sub-contractor, who were engaged in blasting, did their work in such a manner as, by an over-charge, to cast rocks against and into a grocery occupied by the plaintiff, near the railroad, destroying and injuring his goods, and doing other damage. These facts appearing, at the close of plaintiff's evidence the counsel for defendant moved for a dismissal of the complaint, on the ground that the blasting was done by the contractor with the defendant or the sub-contractor with said contractor ; and that any alleged claim of the plaintiff for any damages occasioned thereby is against them, and not against the defendant. The court granted the motion, and dismissed the complaint, and plaintiff's counsel excepted. The General Term reversed this judgment and ordered a new trial.

Elliot F. Shepard, for appellant.

Wm. Barney, for respondent. Defendant was liable for the injuries done by the blasting. *Hay v. Cohoes Co.*, 3 Barb. 42, 44 ; 2 Comst. 159, 161-163 ; *Radcliff's Exrs. v. Mayor, etc.*, 4 id. 199 ; *Losee v. Buchanan*, 51 N. Y. 479 ; *Stone v. Ches. R. R. Co.*, 19 N. H. 427 ; 2 Hill. on Torts, 420 ; *Carman v. S. and J. R. R. Co.*, 4 Ohio St. 399 ; *Lowell v. B. and L. R. R. Co.*, 23 Pick. 24 ; *Gourdier v. Cormack*, 2 E. D. S. 200 ; Sedg. on Dam. (3d ed.) 136, 145, 146, 480, 555 ; *Meyers v. Malcolm*, 6 Hill, 292 ; *Gilbert v. Beach*, 5 Bosw. 445 ; *First Bp. Ch. v. Sche. and T. R. R. Co.*, 5 Barb. 85 ; *Congreve v. Smith*, 18 N. Y. 82, 83 ; *Congreve v. Morgan*, id. 85 ; *McKeon v. See*, 51 N. Y. 306, 307 ; *Storrs v. City of Utica*, 17 id. 108 ; *Water Co. v. Ware*, 16 Wall. 566.

EARL, C. The defendant had the right to build its road in the place where it was located, and, hence, was not engaged in an unlawful enterprise. It let the contract to build the entire road to one Decker, and it seems that he sub-contracted the whole or a portion of the work, and the blasting complained of was done by men employed by the sub-contractor. Over these men the defendant had no control. It neither hired nor paid them, and could not control, direct nor discharge them. Hence, the rule

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of *respondet superior* applies ; and the principal for whom the men were working, and by whom they were employed, and not the defendant, is liable for the damage done to the plaintiff. There has been difficulty in the application of this rule, growing out of the fact that it is not always easy to determine whose servant the person committing the wrong is. There is no such difficulty in this case. Every man is answerable for acts done by the negligence of those whom the law denominates *his* servants, because such servants represent the master himself, and their acts stand upon the same footing as his own. In *Hobbit v. London, etc.*, 4 Exch. 255, ROLFE, B., says : "The liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim *qui facit per alium facit per se*. The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskillful or careless person to execute his orders should be responsible for any injury resulting from the want of skill or want of care of the person employed ; but neither the principle of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned."

This is not a case where defendant contracted for work to be done which would necessarily produce the injuries complained of. They were caused by the unskillful and negligent manner in which the blasts were conducted. The injuries were not occasioned in consequence of the omission of any duty which was incumbent on the defendant. It had let the contract, so far as appears, to a competent person, and had provided, in the contract, that he should be responsible for any damage occasioned by blasting. The defendant did not authorize or permit a nuisance upon its premises. If it had, it would have been liable for any damage occasioned by the nuisance. Hence, if the defendant can be held liable in this case, it must be upon the naked ground that it is responsible for the careless acts of the sub-contractor's servants over whom it had no control. There is no authority in this State for imposing such a liability under such a state of facts.

In *Pack v. The Mayor, etc., of New York*, 8 N. Y. 222, the defendants had let a contract to one Foster to level and regulate Bloomingdale road, in the city of New York, and Foster had sub-contracted with one Riley to do all the blasting of rocks upon the job ; and Riley, while engaged in blasting, threw rocks into the plaintiff's house, doing damage for which the action was brought. It was held that defendants were not liable ; that Riley was not their servant ; and hence, that they were not, under the rule of *respondet superior*, responsible for his acts. This case was

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approved and followed in *Kelly v. The Mayor, etc., of New York*, 11 N. Y. 432. In the latter case, the defendants had let the contract of grading a street, in the city of New York, to one Quin ; and his servants, in blasting rocks in the street, caused a stone to be thrown against plaintiff's house and for the injury thus caused the plaintiff sued. It was held that defendant was not responsible for the negligence of Quin's servant. It is impossible to distinguish these cases from the one now before us. They have never, so far as I can discover, been questioned.

In *Storrs v. The City of Utica*, 17 N. Y. 104, while Judge Comstock criticised the case of *Blake v. Ferris*, 5 id. 48, he expressly approved the two cases above cited. In that case the defendant was held liable, because it owed a duty to the public to keep its streets in a safe condition for travel, and not because it was responsible for any negligent act of the contractor. In *Water Company v. Ware*, 16 Wall. 566, the defendant had taken a contract to lay water pipes along the streets of the city of St. Paul, and then sub-contracted the work, and the sub-contractor, by his carelessness, caused the injury sued for. The defendant was held liable, because he had agreed, in his contract with the city, to be responsible for all such damages. CLIFFORD, J., lays down the following rules applicable to such cases : "When the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable ; but when the obstruction or defect which occasioned the injury results directly from the acts which the contractor agreed and was authorized to do, the person who employs the contractor and authorizes him to do these acts is equally liable to the injured party." In this case, the injury complained of did not result directly from any thing which the contractor was bound, by his contract, to do, but from the careless and wrongful acts of the men engaged in the blasting. If the blasting had been properly done the plaintiff would have suffered no damage.

In *Butler v. Hunter*, 7 Hurl. & N. 826, the plaintiff and defendant were owners of adjoining ancient houses, and an architect, employed by the defendant to superintend the repairs of his house, having considered it necessary to pull down and rebuild the front wall, agreed with a contractor to do the work for an estimated price, and the workmen of the contractor, in pulling down the wall, removed a breast summer which was inserted in the party-wall between defendant's and plaintiff's house, without taking any precautions by shoring or otherwise, in consequence of which the front wall of the plaintiff's house fell ; and it was held that there was no evidence for the jury of any liability on the part of the

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defendant. POLLOCK, C. B., said: "No doubt, when the act is, in itself, a nuisance, the party who employed another to do it is responsible for all consequences, for then the maxim '*qui facit per alium facit per se*,' applies. But when the mischief arises not from the act itself, but the improper mode in which it is done, the person who ordered it is not responsible unless the relation of master and servant exist." In *Reedie v. The London, etc.*, 4 Exch. 244, a company, empowered by act of Parliament to construct a railway, contracted, under said act, with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractor's workmen for incompetence. The workmen, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath, along the highway, by allowing a stone to fall upon him; and it was held that the company was not liable, and that the terms of the contract did not make any difference. ROLFE, B., said: "The wrongful act here could not, in any possible sense, be treated as a nuisance. It was a single act of negligence, and in such a case there is no principle for making any distinction by reason of negligence having arisen in reference to real and not to personal property." During the argument of the case, PLATT, B., put the following question to counsel: "Suppose the occupier of a house were to direct a bricklayer to make certain repairs to it, and one of his workmen, through his carelessness, were to let a brick fall upon a passer-by, is the owner liable?" The decision of the case answered this question in the negative.

In *Allen v. Willard*, 57 Penn. St. 374, AGNEW, J., said: "The principle extracted from the cases is said to be, that a person, natural or artificial, is not liable for the acts or negligence of another unless the relation of master and servant, or principal and agent, exist between them; and that when an injury is done by a person exercising an independent employment, the party employing him is not responsible to the person injured. This doctrine, it must be noticed, has regard to cases where the purpose of the contract is entirely lawful, and where the owner of the property upon which the contract is to be executed can lawfully commit its performance to others."

The case of *Hay v. The Cohoes Co.*, 2 Comst. 159, is not an authority, and has never been regarded as an authority upon the questions involved in this case. It was there assumed that the persons who caused the injuries complained of were the agents and servants of the defendants, and the only question considered in the Court of Appeals was, whether the defendants could be made liable without the proof of negligence.

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A further reference to authorities cannot be useful. They are not uniform and free from confusion. It has not always been easy to determine whether the relation was that of master and servant, or that of contractor and contractee, and some difficulties have been occasioned by attempts to establish a distinction between the owners of real and of personal property, and to hold the former to a stricter liability than the latter by making them responsible for the negligent use and management of their real estate, and negligent conduct upon it by contractors and their agents. But this distinction has been quite thoroughly repudiated, as is shown by the cases above cited, and also by *Shearman and Redfield on Negligence*, 95, and cases cited in note.

I am, therefore, of opinion that the disposition of this case at the Circuit was the proper one, and that the order of the General Term must be reversed, and judgment at the Circuit affirmed, with costs.

All concur with EARL, C., except DWIGHT, C., dissenting.*

Order of General Term reversed, and judgment at Circuit affirmed.

PERRY, appellant, v. THE LORILLARD FIRE INSURANCE COMPANY.

(61 N. Y. 214.)

Fire Insurance — condition in policy — change of title to property — effect of bankruptcy of insured.

A policy of fire insurance was conditioned to be void if any change should take place "in the title or possession of the property, whether by legal process or judicial decree or voluntary transfer." The insured was declared a bankrupt in involuntary proceedings, and his property was assigned by the register to the assignee in bankruptcy. Afterward the insured property was destroyed by fire. *Held*, that the policy had become void under the condition, and this even though the loss, if any, was by the terms of the policy payable to a mortgagee.

* DWIGHT, C., delivered a lengthy dissenting opinion, the ground of his dissent being indicated by the following extract from the close of his opinion :

"The ground upon which the decision of this case is to be rested is substantially this : Railway companies, in excavating for their works, if they cast stones and earth, by blasting or otherwise, upon the lands of adjoining proprietors, are presumptively liable for the injuries caused, as having committed a breach of duty imposed upon them by the general rule of law, that one must use his own property so as not to injure an adjoining proprietor. This presumption may be repelled by showing that the act of casting out the stones, etc., was necessary to the construction of their works, as authorized by the legislature, in which case the act becomes *damnum absque injuria*. Unless the presumption can be repelled in this manner they are liable for the consequences of the unlawful act caused by their breach of duty, and cannot shift off responsibility by showing that the act was done through the medium of a contractor. This rule is particularly applicable where the contractor is employed to do the very act which, in its results, causes such breach of duty."

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ACTION upon a policy of insurance against fire, issued December 14, 1869, by defendant to James Cochrane upon a house owned by him. The policy provided as follows :

“ Loss, if any, pay Chauncy Perry ” (the plaintiff), who, at that time, held a mortgage on the property insured, exceeding the amount of insurance. The policy also contained this condition : “ If the property (insured) shall be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance,” then “ this policy shall be void.” The house was burned on the 23d day of May, 1870, damaging the property beyond the amount of the insurance (Cochrane being then, and up to the time of the trial, on February 28, 1871, in possession thereof). Previous to that time involuntary and compulsory bankruptcy proceedings were commenced against the said Cochrane, which resulted in an adjudication made on the 1st day of April, 1870, declaring and adjudging him a bankrupt, and the register in bankruptcy, on the 30th day of April, 1870, by virtue of the bankrupt act, conveyed and assigned to the assignee, selected by the creditors, all the estate, real and personal, of the said bankrupt, including all the property, of whatever kind, of which he was then possessed, or in which he was interested or entitled to have on the 26th day of January, 1870 (the time when the bankruptcy proceedings were commenced), with all his deeds, books and papers relating thereto, excepting such property (not including that in question) as was exempted from the operation of the assignment by the provisions of the fourteenth section of the said act. It was admitted on the trial that the proceedings in the court of bankruptcy were regular so far that the court acquired jurisdiction of the person and estate of Cochrane.

At the close of the evidence the defendant's counsel moved for a nonsuit, on the ground that the involuntary proceedings in bankruptcy produced such a change of title in the property insured as to render the policy void by the terms thereof. The motion was granted, and an exception taken thereto was ordered to be heard in the first instance at General Term, when the order was affirmed.

Geo. F. Danforth, for appellant. The words of the condition as to sale or transfer or change of title entail a forfeiture and must be strictly construed. 15 Johns. 276 ; 2 Wils. 234 ; *Hoffman v. Ins. Co.*, 32 N. Y. 403. A change caused by an adjudication in bankruptcy is not within the condition of the policy. Bac. Abr., *Sheriffs, m.*; 2 How. (U. S.) 256, 257 ; Gen. R. R. Law of 1850, § 10 ; *Wadham v. Marlow*, 2 Chit. 607. Neither the adjudication in bankruptcy nor the subsequent proceedings

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effected any change in the title to or possession of the property insured. 2 Pars. on Cont. 380, 488, 672; *Ont. Bk. v. Mumford*, 2 Barb. Ch. 596; 4 Nat. Bk. Reg. 110; Phil. Ins. 107; *Copeland v. Stevens*, 1 B. & A. 592; 17 Wall. 481. Notwithstanding the adjudication and proceedings in bankruptcy, Cochrane still had an interest in the policy. *Charman v. Charman*, 14 Ves. 580; *In re Hoyt*, 3 Bk. Reg. 13; *Hitchcock v. N. W. Ins. Co.*, 26 N. Y. 68, 69; *Wilson v. Hill*, 3 Metc. 70; *Strong v. Manf. Ins. Co.*, 10 Pick. 40; *Adams v. Rock. Mut. Ins. Co.*, 29 Me. 292; *Kitts v. Massasoit Ins. Co.*, 56 Barb. 183; *Phelps v. Gib. F. Ins. Co.*, 9 Bosw. 404; *Waring v. Loder*, 53 N. Y. 581.

James B. Perkins, for respondent.

LOTT, Ch. C. The act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867 (U. S. Stats. at Large, vol. 14, p. 517), by section 14 thereof, declares that as soon as an assignee in bankruptcy is appointed and has qualified, the judge of the court of bankruptcy, or, where there is no opposing interest, the register in bankruptcy shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his books and papers relating thereto; that such assignment shall relate back to the commencement of the proceedings in bankruptcy, and that thereupon, by operation of law, the title to all such property and estate, both real and personal (except certain property exempted from its operation not embracing or including that in question), shall vest in the said assignee. It then further declares as follows: "All the property conveyed by the bankrupt in fraud of his creditors, all rights in equity, choses in action, patents and patent rights and copyrights, all debts due him or any person for his use, and all liens and securities therefor, and all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person arising from contract or from the unlawful taking or detention, or for injury to the property of the bankrupt, and all rights of redeeming such property or estate, with the like right, power, title and authority to sell, manage, dispose of, sue for and recover or defend the same, as the bankrupt might or could have had if no assignment had been made, shall, in virtue of the adjudication in bankruptcy and the appointment of his assignee, be at once vested in such assignee."

The bankrupt, Cochrane, at the time of the adjudication of the court of bankruptcy declaring him to be such, and at the time of the assignment by the register in bankruptcy, under and in pursuance of the above

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mentioned provision, to the assignee appointed by him, owned and was in possession of the dwelling-house insured and covered by the defendant's policy, and it, by the assignment, passed to the said assignee, subject to the plaintiff's mortgage. The policy, after insuring the property, declared on its face that the loss, if any, was payable to the said plaintiff; and his interest, *as mortgagee*, was not specifically insured. He therefore stood in the same relation to the defendant as Cochrane, the insured, did, and his rights were subject to all the conditions and provisions contained in the policy, to the same extent as if the clause declaring the loss, if any, to be payable to him, had not been inserted. See *Grosvenor v. The Atlantic Fire Insurance Company*, 17 N. Y. 391. One of those conditions and provisions was, that if the insured property should be sold or transferred, or any change take place in title or possession, whether by *legal process or judicial decree*, or voluntary transfer or conveyance, then, and in every such case, the policy should *be void*. The question is then presented, whether the policy in question had become void at the time the fire occurred—which was on the 23d of May, 1870,—more than a month after Cochrane, the assured, was adjudged to be a bankrupt, and twenty-three days after the date and execution of the said assignment by the register to the assignee in bankruptcy. There can be no doubt that Cochrane had then ceased to be the owner of the premises, and that there had been a transfer and change of title effected by the bankrupt proceedings, although he himself had not made a sale or voluntary transfer or conveyance thereof. Is the transfer and change of title so made a violation of the condition or provision of the policy above referred to? I cannot doubt that it is. The bankrupt act above referred to declared the several District Courts of the United States to be “constituted courts of bankruptcy,” with original jurisdiction in their respective districts, in all matters and proceedings in bankruptcy, and they were thereby “authorized to hear and adjudicate upon the same,” according to the provisions of the said act. The policy in question was issued after that act took effect; and the language used is sufficiently broad and comprehensive to include a transfer and change of title by or under a decree of a court of bankruptcy. It not only declares that if the property insured shall be sold or transferred, but also that if “*any change take place in title*” or possessions, “*whether by legal process or judicial decree*, or voluntary transfer or conveyance,” then, and in every such case, the policy shall be void. The adjudication of the court of bankruptcy, adjudging and declaring Cochrane a bankrupt, was a judicial decree, and the bankrupt act declared that all his property was, “*in virtue of the adjudication of bankruptcy, and the appointment of his assignee, at once vested in such*

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assignee," and it further declared that a copy, duly certified by the clerk of the court, under the seal thereof, of the assignment made by the judge or register, as the case might be, to him as assignee, should be *conclusive evidence of his title* as such assignee, to *take, hold*, sue for and recover the property of the bankrupt. These provisions clearly show that there was a *transfer and change of title* to the dwelling-house insured by the policy, under and by virtue of such adjudication. There is no ground for saying, as is claimed by the appellant's counsel, that the words "judicial decree," used in the policy, have a "technical meaning." He says, using his own language, that "they express a judgment in a court of equity, and were so used in the policy, referring, undoubtedly, to some proceedings the result of which was a decree acting upon property direct, as by direction to convey or to enforce a mechanic's lien, or vendor's lien, or foreclosure of a mortgage." There is no authority or reason for such a limitation. The terms are general, and not in any manner restricted to a decree of any particular court or tribunal competent to render a judgment or decree, which, in its effect, or by its results, operates as a transfer, or change of title. They were used in contradistinction to "a voluntary transfer or conveyance," which is also specially mentioned as a means of effecting a change of title, and, by construction of the courts, has been held not to extend and apply to a transfer of title by operation of law, and consequently was not considered to be a violation of the covenant against alienation in policies of insurance and leases containing them. Judgments of a court of equity, which the counsel concedes to be within the terms, do not, *per se*, so effectually transfer the title to the property affected thereby as the adjudication in bankruptcy does, by virtue of the provisions of the bankrupt act herein above particularly referred to. They are the foundation and authority for executing conveyances, as prescribed and directed thereby; and it is clear that an alienation by or through a judgment or decree of any and every competent court was prohibited, and that it was intended to declare that such an alienation of the property insured, as well as that by a conveyance executed by the owner himself, should render the policy void. Such is the fair and proper construction of the terms used to express the intention of the parties, with the view and object, unquestionably, of declaring that a change of title by operation of law in the cases designated, as well as voluntary conveyances, should be a violation of the covenant against alienation in the policy and render it void; and, as the counsel of the respondent well says, to hold that the title has not been changed by the decree in bankruptcy, is to nullify the agreement of the parties, which is to be construed and have the same effect when expressed in a policy of insurance

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as in any other instrument. See *Savage v. Howard Ins. Co.*, 52 N. Y. 502.

The case of *Starkweather v. Cleveland Ins. Co.*, 2 Abb. (U. S.) 67 decided by the District Court of the Northern District of Ohio, is not inconsistent with the views above expressed, in relation to the covenant and its effect, but in perfect and entire harmony therewith. By a reference to the facts therein, it appears that the covenant against alienation contained in the policy, there in question, was in these words: "If the title to the property is transferred or changed, this policy shall be void." No mention is made as to the manner of effecting such transfer. And SHERMAN, J., in his opinion, says that "the covenant against the change or transfer of title in different policies varies somewhat in phraseology. In some policies the language used is 'sold or conveyed in whole or in part,' in others 'shall not be alienated by sale or otherwise,' or, as in this, 'the title shall not be changed or transferred.'" He adds, "all these expressions are in substance the same. * * *

These covenants, therefore, on the part of the assured, are that he will not assign the policy or in any manner change his title to, or the ownership of the property insured." This last remark clearly shows that he considered and construed the covenant, then the subject of consideration, to be limited and restricted to a transfer or change of title by the *assured himself*, and not to extend to or include a change of title by mere operation of law. This is more fully shown by what he subsequently says. After a review of certain cases cited by him, upon the effect of an involuntary act of bankruptcy upon the breaches of covenant in insurance, and other like contracts, he concludes as follows: "On these authorities, it seems clear to me that the clauses in this policy forbidding its assignment, and the change and transfer of the title to the property have no more effect than similar words in leases. Both are contracts between two persons, with this difference, that leases are under seal and therefore of a higher nature." The authorities referred to by him, related to general covenants against alienation, construed to be limited in their effect to a *voluntary alienation* by the parties themselves, and none of them appear to have extended the covenant, as the policy now the subject of consideration does, to a transfer or change of title "by legal process or judicial decree," and not limiting it to a "voluntary transfer or conveyance." The difference in the terms of the covenant in the case of *Starkweather v. Cleveland Ins. Co.* from that in this, shows that it cannot be considered as an authority against the construction given by me to the covenant in question. The learned judge in that case also advances the doctrine (not necessary to the decision made by him as

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above stated, as to the meaning of the policy) that the assignee, in cases of involuntary bankruptcy had "the mere control of the bankrupt's property, as the agent of the law, to sell the same and pay his debts," saying "that the law does not give to, or vest in, him the absolute ownership in his own right to the property. He is a mere trustee, accountable under the law to the *cestui que trust*. He holds the property assigned to him in trust of all leases and policies, as well as other property," and claims that the property, notwithstanding the adjudication adjudging him a bankrupt, and the assignment of his property by the register in bankruptcy, is still, in law, the bankrupt's property, but by operation of law, in the hands of the assignee, for the sole purpose of selling and applying the proceeds for the bankrupt's benefit. I concede that the property does not become vested in the assignee, as his *own individual property*, to be held by him in *his own right* and for his personal use and benefit, and that it is held by him *in trust*, but for the benefit, *primarily, of the bankrupt's creditors*, and so far for his use in the payment of his debts. I, however, do not agree with him that the *title* to the property does not become *vested* in the assignee, but on the contrary, as I have shown, the *title* thereto, and not the mere *control* thereof, is, by the clear and unequivocal language of the bankrupt act, to which reference has hereinbefore been particularly made, declared to be vested in the assignee. He becomes the *owner* thereof in trust, I admit, for the purposes declared in the said act, but, nevertheless, *the owner*, and does not stand in the mere relation of *agent* for the bankrupt who, both in fact and law, has, by the proceedings, become divested of the legal title.

It follows, from the views above expressed, that the judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

THE GLEN AND HALL MANUFACTURING COMPANY v. HALL, appellant.

(61 N. Y. 226.)

Trade-mark — place of business.

Where one has established a business at a particular place, from which he has or may derive profit, and has attached to such business a name indicating to the public where it is carried on,—e.g., "No. 10 South Water street,"—he thereby acquires property in the name, which will be protected from invasion by a court of equity on principles, analogous to those applicable in case of the invasion of a trade-mark. (Lott, Ch. C and EARL, C., dissenting.)

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ACTION to restrain the defendant from the use of the words "Number 10," as a trade-mark. The defendant set up a counter-claim to the same trade-mark, and asked to have the plaintiff restrained from using it.

The justice at the trial found the following facts: Joseph Hall established, more than thirty years before the trial, on South Water street in the city of Rochester, a manufactory for the construction of threshing machines. The business was carried on extensively until his death, in 1865. His establishment was known for many years as "Number 10 South Water street."

The defendant, Charles S. Hall, purchased the establishment from the executors of Joseph Hall, together with "the tools, patterns and fixtures," in May, 1868, and took possession of the same in February, 1869, since which time he has carried on the same business at the same place. In April he printed in his hand-bills, and adopted as his trade-mark, the words, "The Old Joseph Hall Agricultural Works, No. 10 South Water street, Rochester, N. Y.," and continued to use such trade-mark until restrained by the injunction granted in the action.

In September or October, 1869, the plaintiff rented a small office on South Water street, a short distance from the defendant's place of business, and painted the number on it, and also printed the number on its bills and on its sign, in the following terms: "The Glen & Hall Manufacturing Company, No. 10 South Water street, Rochester, New York."

At this time the plaintiff was carrying on the same business as the defendant. Its shops are located in the town of Brighton, two miles and more from the shops of the defendant. It took the office in South Water street and adopted the number (10) with the intention of interfering with the defendant's business, and unfairly securing his customers.

On these findings the judge reached the conclusion of law that "Number 10," at the time of the purchase in April, 1869, and since, was a material part of the defendant's trade-mark; that he was entitled to compensation for damages occasioned by his being restrained from using it, as well as to those sustained by reason of the plaintiff's use, and also to a perpetual injunction restraining the plaintiff from using said number as its trade-mark, or keeping the same on its office or building in South Water street, or using it in any way in imitation of the defendant's trade-mark.

A reference was then ordered to ascertain and report the damages, and on the confirmation of the report judgment was directed to be entered.

A motion for a new trial was granted by the General Term, on the

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ground that the defendant was not entitled to the special relief, both because "Number 10" was not a trade-mark, and that if it were, such relief could not be granted by way of counter-claim to the present action, and defendant appealed.

James C. Cochrane, for appellant.

James Brick Perkins, for respondent.

DWIGHT, C. The first question which will be considered in this case is, whether the words "Number 10," used under the circumstances detailed in the statement of facts, constitute a good trade-mark.

It must be conceded that it does not comply with the definition of a trade-mark as usually given in the text-books. That has been commonly confined to the products of manufacture or of human labor. Thus Upton says, "a trade-mark is the name, symbol, figure, letter, form or device adopted and used by a manufacturer or merchant in order to designate the goods that he manufactures or sells and distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his." (Page 9.) The doctrine was, however, extended in *Congress Spring Company v. High Rock Spring Company*, 45 N. Y. 291; S. C., 6 Am. Rep. 82; to a peculiar product of nature, the water of mineral springs, generally known in the market and sold as a useful article. In that case it was declared that the true principle applicable to the subject was that the purchaser of an article under a trade-mark has a right to have the very thing which he seeks; and the owner has the right that the very thing sought shall be sold for his profit. This rule was held to be as clearly applicable to such products of nature as have been referred to, as to the results of human industry.

In the case at bar there was no product of industry or of nature. The trade-mark, if it existed at all, was attached to the building or works in which the products of human labor were made. This fact does not affect the application of the principle set forth in the *Congress Spring* case. It is still true that the purchaser of an article manufactured at "No. 10 South Water street" has a right to have the very thing which he seeks, and the owner of the goods there manufactured has the right that the very thing sought shall be sold for his profit.

The authorities are not at variance with this conclusion, but tend to support it.

The case at bar, properly considered, is a species of "good will," analogous to a trade-mark. Browne on Trade-marks, §§ 96-100. In

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Churton v. Douglass, 1 Johns. (Eng.) 188, V. C. WOOD (Lord HATHERLEY) explains with care the meaning of the term "good-will." It does not mean simply the advantage of occupying particular premises which have been occupied by a manufacturer, etc. It means every advantage, every positive advantage that has been acquired by a proprietor, in carrying on his business, whether connected with the premises in which the business is conducted, or with the name under which it is managed, or with any other matter carrying with it the benefit of the business.

It is a well-known fact that the "good-will," like a trade-mark, is a species of property. It is a subject of sale by the proprietor or may be sold by order of the court. The cases in which a sale has taken place by order of the court have been, in general, those of partnership. These have been treated as cases of property, and it is on that ground alone that the jurisdiction of the court has attached to them.

There may thus be, in a particular business, both a "good-will" attending it and a trade-mark attached to goods manufactured and sold. Each of these is under the protection of a court of equity. *Hall v. Barrows*, 9 Lond. Jurist (N. S.) 483; S. C., 4 De G., J. & S. 150. The court in each case acts on the principle of preserving a property in the good-will or trade-mark. *Hall v. Barrows*, *supra*; *Bury v. Bedford*, 4 id. 352; *Edelsten v. Edelsten*, id. 479; *Partridge v. Menck*, How. App. Cases, 559. In the case of *Cloth Company v. Cloth Company*, 9 Law Times (N. S.) 553; 4 De G., J. & S. 137, it is said that the jurisdiction of the court to grant relief does not rest on supposed fraud, but upon a *property* in the trade-mark, and upon the fact that an injunction is the only mode of protecting it. The earlier cases to the effect that there is no property in a trade-mark must be deemed in that respect to be overruled. *Perry v. Truefitt*, 6 Beav. 73; *Collins' Co. v. Brown*, 3 Jur. (N. S.) 929; *Blanchard v. Hill*, 2 Atk. 485.

A trade-mark, or a designation of one's trade, may thus be sold by order of the court, whether it be attached to a new business or to one long existing. In such case "good-will" and trade-marks are governed by similar rules. In *Bradbury v. Dickens*, 27 Beav. 53, on the dissolution of a partnership, the title of a magazine, "Household Words," was, by order of the court, put up at auction and sold. The court said that property in a literary periodical like this is confined purely to the mere title, and that forms part of the partnership assets and must be sold for the benefit of the partners, if of any value. The decree ordered the sale of the right to use the name of the periodical and the right to publish, under the same name and title, *any periodical or other work, whether in*

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continuance of said periodical called "Household Words," or otherwise, as the purchaser might think fit. The sale showed what the value of a mere title might be, as it produced £3,550.

It would follow, from these principles, that if a person had established a business at a particular place, from which he has derived, or may derive, profit, and has attached to that business a name indicating to the public where or in what manner it is carried on, he has acquired a property in the name which will be protected from invasion by a court of equity, on principles analogous to those which are applied in case of the invasion of a trade-mark.

In *Harper v Pearson*, 3 Law Times (N. S.), 547, the plaintiff and defendant carried on business of a similar description. On the expiration of the term, in a lease of certain works to the plaintiffs, where they had carried on their business, the defendants, fifteen months afterward, had procured a lease of the same works, with the exception of certain mines of clay. The defendants issued a circular and card tending to lead the public to suppose that the defendants had succeeded to the business of the plaintiff, and were working the same material as the plaintiff had formerly used. It was held by the court, that though the words of the circular and card might be literally true, yet if they tended to mislead the public it would restrain them from further circulating or issuing any similar circular or card. The court said: "It is a clear case that the defendants have represented on the card to the public that Messrs. Pearson are late 'Harpers & Moore,' and they have no business to do that, and I must grant an injunction." This case is a strong illustration of the doctrine under consideration, as the court must have held that the plaintiffs in that case had a property in the good-will of the business and of the name under which it was carried on, even after they had ceased to transact their business at the particular place where the appellation "Harpers & Moore" was first used. In other words, the name of the business could be severed from the place where it was transacted, and while thus separated could be treated as an object of property, so as to prevent third persons from attaching it to their business and thus depriving the owners of a legitimate profit which they might reap elsewhere under the same name. It seems plain that if a banking-house had acquired a name, such as that of Baring Brothers, though there were no partner of the name of Baring, it would, on general principles of law, and independent of a statute preventing the use of fictitious names, have a property in such name, without reference to the particular place where the business was carried on. Though the name might be inseparable from the business, it would be separable from the premises; so that the business might, for example

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be carried on on the opposite side of the street. These doctrines find further support in *Partridge v. Menck*, 2 Barb. Ch. 103; *Peterson v. Humphrey*, 4 Abb. Pr. 394; *Howard v. Henriques*, 3 Sandf. S. C. 725; *Marsh v. Billings*, 7 Cush. 322; *Christy v. Murphy*, 12 How. Pr. 77; *Hudson v. Osborne*, 39 L. J. (N. S.) Ch. 79: other cases in Browne on Trade-marks, ch. 12.

In *Partridge v. Menck*, Chancellor WALWORTH said: "The court, in trade-mark cases, proceeds on the ground that the plaintiff has a valuable interest in the good-will of his trade or business, and that having appropriated to himself a particular label, sign or trade-mark, indicating that the article is manufactured or sold by him under his authority, or *that he carries on his business at a particular place*, he is entitled to protection against any one who attempts to pirate upon the good-will of his friends or customers, or patrons of trade, by sailing under his flag without his authority."

In *Howard v. Henriques*, the question was as to the rights of a hotel proprietor to the designation of his hotel (Irving house). The court said that every man ought to be permitted to pursue his lawful calling in his own way, provided he does not encroach on the rights of his neighbors or the public good. But he must not, by any deceitful or other practice, impose on the public, and he must not, by dressing himself in another man's garments, and by assuming another man's name, endeavor to deprive that man of his own individuality and of the gains to which, by his industry and skill, he is fairly entitled. It was held that in the case then under discussion the hotel-keeper must not be deprived of the fruits of that good-will which belonged to himself alone. *Marsh v. Billings*, *supra*, presented facts involving a like principle.

In *Christy v. Murphy*, the rule was applied to the protection of a place of public amusement. *Hudson v. Osborne*, *supra*, is quite in point. The "good-will" in a title to a manufactory of certain provisions had been sold by assignees in bankruptcy to the plaintiffs, who continued to carry on under the title ("Osborne house") a business such as that which the defendant Osborne, the bankrupt, had formerly conducted under the same name. Osborne, having been discharged in the bankrupt proceedings, commenced anew, and used upon his new place of business the words "Osborne house," where he carried on the same kind of manufacturing as before. He put up signs on his buildings and issued circulars calculated to lead the public to believe that he was conducting the old business. The court said that he had no right to use the words "Osborne house" as holding out, in any manner, that he was carrying on business in continuation of or in succession to the business originally conducted

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by Osborne, the defendant. He might have said that he had been twenty-two years at the Osborne house, or that one of his partners had been for many years managing there, but he must not appropriate to himself the very words which were selected to designate the business, so as to lead persons to think that he is continuing the identical business which has been sold. On the same principle, a person who has been a manager of another's business has a right, on setting up an independent business, to make known to the public that he has been with the firm, but he must take care not to do so in a way calculated to lead the public to believe that he is carrying on the business of his former employer, or is in any way connected with it. *Glenny v. Smith*, 2 Drew. & Sma. 476; *Hookham v. Pottage*, L. R., 8 Ch. 91. It was not denied by the plaintiff in the present case, that the words "Number 10," South Water street, were a mere arbitrary designation, and did not correspond to any street numbering. It is clear that this title passed with the property and business. *Hudson v. Osborne*, *supra*; *Hall v. Barrows*, *supra*; Upton on Trade-marks, 75, citing *Compère v. Bajou*, French Court of Cassation; *Howe v. Searling*, 10 Abb. Pr. 264. The neglect to carry on the business for a number of years does not prevent a party from resuming his trade-mark or sign of the good-will, nor entitle another to use it. (Same cases.) It is also held in *Walton v. Orowley*, 3 Blatch. 440, that a person may become a complete assignee of a trade-mark and acquire all the rights of the former owner.

The defendant, however, in the present case, had acquired the right, by his own acts, to make use of the designation. There is evidence to show that the defendant, in June, 1869, issued a price-list of his manufactures as of 10 South Water street. The plaintiff did not make use of this designation until after August 9th of that year. No particular length of time is necessary. Lord ROMILLY, in *Hull v. Barrows*, said that the right might be acquired in a week's use, even though the article to which the trade-mark was attached had acquired no particular reputation in the market under the designation. These propositions are perfectly consistent with the idea that a trade-mark, etc., is property.

It is claimed, however, in one of the plaintiff's points, on the argument, that the learned judge, at the trial, erred in his finding of facts, as there was no evidence to support some of them. No such point was taken at the General Term. That tribunal proceeded on the ground that there was no right of the defendant which could be protected in the action, assuming the facts to be as found by the judge. If, however, the correctness of his findings is before us, I think that there was evidence sufficient to maintain

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such findings as are necessary to uphold the defendant's right. Any thing beyond this is immaterial, and could not harm the plaintiff.

It is now necessary to inquire whether the rights of the defendant to the good-will of the business can be enforced in the present action by way of counter-claim. It was held that they could under the provisions of the Code.

The order of the General Term should be reversed, and that of the Special Term should be affirmed.

All concur; except LOTT, Ch. C., and EARL, C., dissenting.

Order reversed, and decision of Special Term affirmed.

HOWARD v. DALY, appellant.

(61 N. Y. 362.)

Contract of service — breach of action for — damages — evidence. Letters — presumption as to their receipt.

Plaintiff entered into a contract with defendant to enter defendant's service at a future day. Upon the arrival of the day named, plaintiff tendered performance, but defendant absolutely repudiated the contract. *Held*, (1) a breach of the contract for which plaintiff had an immediate right of action; (2) that the action was one for damages for such breach and not for wages; (3) that it was not necessary for plaintiff, after such breach, to tender service or to keep in readiness to perform.

In an action against an employer for breach of a contract of service defendant may show, in mitigation of damages, that plaintiff has not used reasonable diligence in securing other employment, and *semble* that the burden of proving that fact is on the defendant. Where a letter is properly directed and posted to a party, or is deposited in a place used by him for such purpose — *e. g.*, the letter-box at his place of business — the presumption is that he received it, and his denial of the receipt simply raises a question of fact.

ACTION for breach of contract of service.
Plaintiff alleged that on the 20th of April, 1870, she contracted with defendant to serve him as an actress at his theater in New York for the season commencing on or about September 15, 1870, and terminating on or about July 1, 1871, at ten dollars a week. That at the proper time she appeared and offered to enter upon such service, but was prevented by defendant. The answer was a general denial.

The referee found the facts substantially as alleged by the plaintiff, and that plaintiff was entitled to judgment for \$410. The other facts are sufficiently stated in the opinion.

Richard M. Henry, for appellant.

Spencer L. Hillier, for respondent.

DWIGHT, C. It is insisted, by the defendant, that the complaint in this cause should have been dismissed, on the ground that the plaintiff made and maintained no proper tender of service. The finding of the referee that the plaintiff offered and tendered performance of her part of the contract, but that the defendant repudiated the contract, and thereby prevented the plaintiff from performing her part of it, is said to be unsustained by the evidence, and to be erroneous.

As this is substantially the whole question raised by the defendant on this appeal, it will be the most convenient way to discuss it, to consider the effect of the acts of the defendant denying the existence of the contract. The fact that there was a valid contract has been found by the referee. The evidence showed that a proposal, in writing, was made by Mr. Daly to the plaintiff for an engagement of her services for the year 1869. The plaintiff testifies that she signed an acceptance on Saturday, April 13, 1870, and placed it in the letter-box of the defendant, at the theater. The defendant admits that this letter-box was sometimes used as a place for deposit of the duplicates of contracts made between him and the actors. It is true that he testified that he never received the papers which the plaintiff asserts that she deposited in the box. This, however, is immaterial. The minds of the parties met when the plaintiff complied with the usual, or even occasional, practice, and left the acceptance in a place of deposit recognized as such by the defendant. This doctrine is analogous to that which has been adopted in the case of communication by letter or by telegraph. *Vassar v. Camp*, 11 N. Y. 441; *Trevor v. Wood*, 36 id. 307. The principle governing these cases is, that there is a concurrence of the minds of the parties upon a distinct proposition, manifested by an overt act. *White v. Corlies*, 46 N. Y. 467. The deposit in the box, under the circumstances of the present case, is such an act.

The case may also be rested upon the fact there was evidence to lead to a presumption that the document reached the defendant, as it was placed in a receptacle considered by him to be a suitable one for the deposit of documents of this class. In the ordinary course of business it would reach the defendant, as he would be supposed to have competent attendants in charge to transact his business. His denial that he received it simply raises a case of conflict of evidence, on which the referee has passed in the plaintiff's favor. In *Dana v. Kemble*, 19 Pick. 112, it appeared that it was the usage of a hotel to deposit all letters left at the bar in an urn kept for that purpose, whence they were sent, almost every fifteen minutes throughout the day, to the rooms of the different guests to whom they were directed. It was held that there was a presumption that a

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letter addressed to one of the guests left at the bar was received by him. The same point was ruled, in substance, in *Hetherington v. Kemp*, 4 Camp. 192, where a letter was placed on a table where letters were usually placed to go to the post-office. The court held that this would be sufficient if it were proved that they were usually carried to the post office. Though no strict usage was established in the case at bar, there was enough proved to show that, in the ordinary course of business, the letter addressed to him by the plaintiff was likely to reach him.

The evidence bearing upon the referee's finding that the defendant repudiated the contract thus formed, is, substantially, as follows: At the end of August, or the beginning of September, 1870, the plaintiff saw the defendant's posters in the street, with a list of his company. Not seeing her name she wrote to the defendant for an explanation, but received no answer. She then went to the theater, where she met the defendant, and asked him why he had not answered her letter, to which inquiry he replied that he had answered it; that it was lying in the box office of the theater for her, and had not been sent to her, because he expected she would call for it. The defendant then handed her the letter, which bore date August 31st, and which stated that he was not aware of making any engagement with the plaintiff for the present season; and that he certainly had no contract with her. After she had read this letter, she said to the defendant that she had his paper of engagement. He seemed quite surprised, and said that he had not got hers, knew nothing about it, and had not engaged her. On her cross-examination, the plaintiff testified that the conversation just detailed occurred the day after the theater opened.

The defendant gives a version of the interview not materially different. He says that, some time after the issue of the preliminary poster, stating the announcement of the season of 1870-71, the plaintiff called on him and wished to know why her name was not on the poster, and he replied because she was not a member of the company. She then stated that she had signed a contract, and he then called her attention to a notice which he had issued requiring an acceptance by a particular day, and stated that he had not received hers. The treasurer of the defendant (Mr. Appleton), who heard the conversation, says that the plaintiff having asked why her name was not on the poster, the defendant answered it was because she had not complied with the notice put up in his green-room; and, there not being any contract, he could not announce her as one of the company.

This testimony shows that the defendant unequivocally refused to recognize the contract. After the plaintiff's statement, he positively de-

clined to receive her as one of the company. The evidence is not perfectly distinct on the point whether the plaintiff's duties had commenced at the time when the defendant's denial of the contract was made. This may, perhaps, be inferred from a statement made by her on cross-examination, that the conversation occurred the day after the theater was opened. As the matter, however, remains in some doubt, the subject will be examined from both points of view.

I. I shall first consider the question on the supposition that the plaintiff's period of service had already arrived, and that, on her application for permission to fulfill her contract, the defendant repudiated his obligations.

No precise form of words was necessary on his part to reject her services; the obligation of the contract being created, a denial of its existence was equivalent to a refusal to allow her to enter upon the service. The defendant's intent is plain. He might reject her services indirectly as well as directly. The sole inquiry is, whether he has done an act *inconsistent* with the supposition that the service continues. In the case of *Short v. Stone*, 8 Ad. & Ell. (N. S.), 358, it was held that if a man promised to marry a woman on a future day, and before that time married another, he had broken the contract with the first woman. This was on the ground that the act done was inconsistent with the contract relations of the parties. See, also, *Lovelock v. Franklyn*, 8 Ad. & Ell. (N. S.), 371. I think, accordingly, that the refusal of the defendant to recognize the contract was equivalent to a refusal to continue the plaintiff in his employment.

The next point is, whether the plaintiff was bound, notwithstanding the defendant's act, to keep herself in readiness to perform the contract at all times, or in any form to tender her services. This inquiry involves the correct theory of the nature of the action. Does the plaintiff sue for wages on the hypothesis of a constructive service, or for damages? This question, as far as appears, has never been fully discussed in the appellate courts of this State; and, on account of both its novelty and importance, will be considered at length.

It is very plain, that if a servant has actually performed the service which he has agreed to render under the contract, he has a right to recover *wages*. That would have been true in the case at bar if the defendant had received her services for the stipulated period. Had he not paid her according to the agreement, her action would have been for the fixed wages. If, on the other hand, she is wrongfully discharged, and the relation of master and servant is broken off as far as he is concerned, it is clear that she cannot recover for wages in the same sense as if she

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had actually rendered the service. In an early *nisi prius* case the fiction of a "constructive" service was resorted to, and a servant discharged without cause was allowed to recover wages. *Gandell v. Pontigny*, 4 Campb. 375; see, also, *Collins v. Price*, 4 Bing. 132. This review has been discarded in later decisions, and has been disapproved by text-writers. *Archard v. Hornor*, 3 Carr. & Payne, 349; *Smith v. Hayward*, 7 Ad. & Ell. 544; *Aspdin v. Austin*, 5 Ad. & Ell. (N. S.), 671; *Fewings v. Tisdal*, 1 Exch. 295; *Elderton v. Emmens*, 6 Com. Bench, 178; *Goodman v. Pocock*, 15 Ad. & Ell. (N. S.), 582; Mr. Smith's notes to *Cutter v. Powell*, 2 Smith's Leading Cases, 20; C. M. Smith on the Law of Master and Servant, p. 95, note *g*; *Whitaker v. Sandifer*, 1 Duvall (Ky.), 261; *Chamberlin v. McCallister*, 6 Dana, 352; *Clark v. Marsiglia*, 1 Den. 317; *Durkee v. Mott*, 3 Barb. 423; *Moody v. Leverich*, 4 Daly, 401.

These cases and authorities hold, in substance, that if a servant be wrongfully discharged, he has no action for *wages*, except for past services rendered, and for sums of money that have become due. As far as any other claim on the contract is concerned, he must sue for the injury he has sustained by his discharge, in not being allowed to serve and earn the wages agreed upon. Smith on Master and Servant, 96, note *n*; *Elderton v. Emmons*, 6 Com. Bench, 187; *Beckham v. Drake*, 2 Ho. Lords Cases, 606. A servant wrongfully discharged has but two remedies growing out of the wrongful act: (1) He may treat the contract of hiring as continuing, though broken by the master, and may recover damages for the breach. (2) He may rescind the contract; in which case he could sue on a *quantum meruit*, for services actually rendered. These remedies are independent of and additional to his right to sue for *wages*, for sums actually earned and due by the terms of the contract. This last amount he recovers because he has completed, either in full or in a specified part, the stipulations between the parties. The first two remedies pointed out are appropriate to a wrongful discharge.

To apply these principles to the case at bar, the plaintiff must have been ready and willing to continue in the defendant's service at the time of the latter's refusal to receive her into his employment. 2 Wms. Saund. 352 *et seq.*, note to *Peeters v. Opie*. It is not necessary, however, that she should go through the barren form of offering to render the service. *Wallis v. Warren*, 4 Exch. 361; *Levy v. Lord Herbert*, 7 Taunt. 314; *Carpenter v. Holcomb*, 105 Mass. 284, and cases cited in opinion by COLT, J. Her readiness, like any other fact, may be shown by all the circumstances of the case. It sufficiently appeared by the conduct of the parties.

After the defendant had declined to give her employment, there was

no further duty on the plaintiff's part to be in readiness to perform. If that readiness existed when the time to enter into service commenced, and the defendant committed a default on his part, the contract was broken and she had a complete cause of action. Tender of performance is not necessary when there is a willingness and ability to perform, and actual performance has been prevented or expressly waived by the parties to whom performance is due. *Franchot v. Leach*, 5 Cow. 506; *Cort v. Ambergate and R. R. Co.*, 17 A. & E. (N. S.), 127. This rule is recognized in *Nelson v. Plimpton Fire-proof E. Co.*, 55 N. Y. 480, 484. Her future conduct could not affect her right to sue, though it might bear on the question of damages. She was not obliged to remain in New York, or in any form to tender her services after they had been once definitively rejected.

If this theory of the plaintiff's case is correct, her only further duty was to use reasonable care in entering into other employment of the same kind, and thus reduce the damages. This obligation is of a general nature, and not peculiarly applicable to contracts of service. The cases on this point are: *Emmons v. Elderton*, 4 H. L. Cas. 646; *Costigan v. Mohawk and H. R. R. Co.*, 2 Den. 609; *Dillon v. Anderson*, 43 N. Y. 231; *Hamilton v. McPherson*, 28 id. 76. The uncontradicted testimony was, that this duty was discharged by the plaintiff. She made effort to procure employment, but failed. While it would be unquestionably her duty to accept, if offered, another eligible theatrical engagement, it could scarcely be expected that she should spend much time in actively seeking for employment. Having made some effort and having failed, I think she was justified, under the known usage in that business of forming companies of actors at certain seasons of the year, and the slight prospect of success in making an engagement after the 15th of September, in awaiting the close of the theatrical season. How far a person who is wrongfully discharged from employment is bound to seek it is not, perhaps, fully settled. *Chamberlain v. Morgan*, 68 Penn. St. 168; *King v. Steiren*, 44 id. 99. In the first of these cases it is said that it is the duty of a dismissed servant not to remain idle, and that the defendant may show, in mitigation of damages, that the plaintiff might have procured employment. This seems to be a reasonable rule. *Prima facie*, the plaintiff is damaged to the extent of the amount stipulated to be paid. The burden of proof is on the defendant to show either that the plaintiff has found employment elsewhere, or that other similar employment has been offered and declined, or, at least, that such employment might have been found. I do not think that the plaintiff is bound to show affirmatively, as a part of her case, that such employment was

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sought for and could not be found. 2 Greenl. on Ev., § 261, *a*; *Costigan v. M. and H. R. R. Co.*, 2 Den. 609.

No such evidence having been offered by the defendant, the plaintiff should recover the whole amount of her stipulated compensation as the damages attributable to the defendant's breach of contract. This, as has been seen, is the true measure of damages. *Clossman v. Lacoste*, 28 E. L. and Eq. 140; *Goodman v. Pocock*, 15 Ad. & El. 576; *Smith v. Thomson*, 8. C. B. 444; Smith on Master and Servant, 98.

Some of the cases which may appear to conflict with this opinion, or which are at variance with it, will now be briefly reviewed. *Taylor v. Bradley*, 39 N. Y. 129, is not opposed. The only point decided in that case was, that if there be an agreement to let a farm for three years on specified terms, the plaintiff stipulating to occupy and work the farm, and to divide the proceeds with the defendant, the owner, and the latter breaks off the agreement, without cause, at the commencement of the letting, the plaintiff may recover immediately as damages, the value of the contract. This proposition is entirely consistent with the views maintained in the present case, though there are *dicta* in the case not easily reconcilable with the result reached by the court. Pp. 141, 142. *Polk v. Daly*, 4 Daly, 411, is supposed by the defendant to support his views. This is a clear mistake. The court expressly approves *Moody v. Leverich* in the same volume. (P. 416.) This case is most distinct and emphatic in the plaintiff's favor. *Polk v. Daly* simply argues the question as one of wages. The plaintiff in that case tendered his services *before* the time for his employment arrived, and was discharged. (It will appear hereafter that in a case where a servant is discharged from his contract before the time of service arrives, he has an election to wait until the contract day arrives and then tender his services, or to sue at once for damages.) He then left the city of New York and remained absent until the whole period had expired, making no efforts to obtain employment. The court held that if the action were for *wages*, he must hold himself in readiness to render the service. This is correct. No opinion was expressed upon the point as to what the rule would have been in an action for *damages*. As far as any authorities are opposed to the theory maintained in the present case, they will appear to rest on the *nisi prius* case of *Gandell v. Pontigny*, already noticed. Thus in *Thompson v. Wood*, 1 Hilt. 96, there is a *dictum* of INGRAHAM, J., that a servant wrongfully discharged has his election to sue for wages as they become due from time to time, or for damages. This remark that he could sue for *wages* evidently proceeds on the discarded doctrine of "constructive service." In *Huntington v. The Ogdensburgh R. R. Co.*

33 How. Pr. 416, there are some remarks of a similar nature by POTTER, J., though there is an apparent confusion between a claim for wages, in case the contract is carried out, and for damages, in case it is broken off. The opinion of JAMES, J., as reported in this case in 7 American Law Register (N. S.), 143, appears to be distinct in its adoption of the doctrine of constructive service. It relies on a case in Alabama (*Fowler v Armour*, 24 Ala. 194), which distinctly holds that doctrine, and on the *dictum* of INGRAHAM, J., in *Thompson v. Wood*, *supra*. There are two or three other cases in the southern and western States that have followed *Gandell v. Pontigny*; *Armfield v. Nash*, 31 Miss. 361; *Gordon v. Brewster*, 7 Wis. 355; *Booge v. Pacific R. R. Co.*, 33 Mo. 212.

This doctrine is, however, so opposed to principle, so clearly hostile to the great mass of the authorities, and so wholly irreconcilable to that great and beneficent rule of law, that a person discharged from service must not remain idle, but must accept employment elsewhere if offered, that we cannot accept it. If a person discharged from service may recover wages, or treat the contract as still subsisting, then he must remain idle in order to be always ready to perform the service. How absurd it would be that one rule of law should call upon him to accept another employment, while another rule required him to remain idle in order to recover full wages. The doctrine of "constructive service" is not only at war with principle, but with the rules of political economy, as it encourages idleness and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their stipulated amount of labor. Though the master has committed a wrong, the servant is not for one moment released from the rule that he should labor; and no rule can be sound which gives him full wages while living in voluntary idleness. For these reasons, if the plaintiff was discharged after the time of service commenced, she had an immediate cause of action for damages, which were *prima facie* a sum equal to the stipulated amount, unless the defendant should give evidence in mitigation of damages.

[The learned Commissioner then considered the rule to be followed in case the defendant's denial of the contract preceded the time for entering into the service, expressing the opinion that the plaintiff would then have an immediate right of action — this is omitted, as it was not concurred in.*]

The whole result of the discussion may now be summed up. If the defendant in the case at bar repudiated his contract with the plaintiff

* See on this point *Daniels v. Newton*, *post*.

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after the time of performance had arrived, the plaintiff had an action for damages. Her interview with the defendant sufficiently showed her readiness to perform. Her action was for damages for not being permitted to work, and not for wages; and the defendant might show affirmatively, and by way of mitigation of damages, that she had opportunities to make a theatrical engagement elsewhere, which she did not accept. Without such proof she was entitled to recover the full amount of the compensation stipulated in the contract.

On the other hand, if the defendant rejected the services of the plaintiff before the time for performance arrived, she had an election either to consider his act as a breach of an implied contract with her to take her into his service, and bring an immediate action; or to wait till the appointed day arrived, and then be in readiness to render her services. Her election will be evidenced by her acts. Having made no tender of her services at the appointed day, the presumption is, that she considered the act of repudiation by the defendant as final, and now brings her action for damages. Her complaint in the action and the evidence taken at the trial are sufficient to establish such a claim. Her damages are, as in the other hypothesis, *prima facie* the entire amount of her compensation, unless proof was offered in mitigation of damages, which was not done. In either aspect of the case the verdict and judgment were right.

My brethren concur with me upon the first ground discussed in this opinion, without expressing their views upon the correctness of the rule laid down in *Hochster v. De La Tour* and kindred cases.*

The judgment of the court below must be affirmed.

All concur.

Judgment affirmed

DUNNING v. THE OCEAN NATIONAL BANK, appellant.

(61 N. Y. 497.)

Trust—devise to an executor in trust—trust is personal. Equitable conversion—Sale of mortgaged property—action for surplus—Administrator.

Land was devised to the executor named in the will in trust for certain purposes. The executor renounced, and an administrator with the will annexed was appointed. *Held*, that the administrator did not become trustee nor succeed to any right in the trust estate.

Land was sold on mortgage foreclosure after the death of the mortgagor. *Held*, that

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the surplus, after satisfying the debt, was real estate, and that the administrator of the mortgagor could maintain no action to recover it.

ACTION by Mary S. Dunning as trustee appointed by the court for executor of a trust created in the will of Margaret Dunning, deceased, to recover surplus moneys arising on the sale of mortgaged premises. The opinion states the case. A judgment was entered for the plaintiff upon a decision of the court and was affirmed by the General Term.

F. W. Hubbard, for appellant. The surplus arising from the foreclosure sale was personal property, and the plaintiff, as administratrix, was the proper person to sue for it. *Bogert v. Furman*, 10 Paige, 496; *Swazey v. Wills*, 1 Bradf. 495; 1 Duer, 308; *Graham v. Dickinson*, 3 Barb. Ch. 169; *Banks v. Scott*, 5 Mad. 500; *Cope v. Wheeler*, 41 N. Y. 308; *Matthew v. Duryee*, 45 Barb. 69; Willard's Eq. 588; 2 Sandf. Ch. 46; Laws 1867, chap. 658. This fund should pass into hands of plaintiff and be administered in the manner prescribed by law. Laws 1858, chap. 314, §§ 1, 2; Code, § 113. Plaintiff, as administratrix, should be held competent to execute the will fully under the statute. 3 R. S. (5th ed.), 157, § 22.

Lansing & Smith, for respondent.

REYNOLDS, C. On the 2d day of April, 1855, William Pearsons conveyed to Margaret Dunning a farm, in the county of Jefferson; and, to secure a part of the purchase-money, she gave a mortgage for \$4,500. This mortgage, by various assignments, became the property of the defendant on the 7th day of December, 1858. Under the power of sale contained in the mortgage, and in pursuance of the statute, the defendant caused the farm to be sold on the 2d day of July, 1861, and purchased it at \$5,190; and the surplus money thence arising was \$1,833.78, which the defendant has ever since and now retains. Margaret Dunning, the owner of the farm, subject, of course, to the mortgage, died on the 19th day of October, 1857, leaving a last will and testament, which was duly admitted to probate on the 3d day of January, 1859.

By this will the farm, covered by the mortgage before referred to (and in respect to the surplus arising upon the foreclosure sale of which the question now in controversy arises), was devised to her "executors hereinafter named," with the rents and profits, in trust, for the use of her then husband and two sons, as follows: To the husband the income and profits of the farm "from time to time, in the discretion of my said ex

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ecutor, for the necessary support and maintenance of my said husband during his natural life." It was further, in substance, declared that if the income of the farm should be insufficient to support the husband, then the executor might mortgage or sell the whole or any part, as "he shall deem most for the interest of my said husband and children," and invest the money for the benefit of the husband. In case the farm was not sold during the life of the husband, the executor was then ordered, as soon after the death of the husband as "may be," to sell the farm for the best price to be obtained, and pay one-half of the money to two daughters, and the other half to be invested for seven years, for the benefit of two sons, in a special manner directed. Without stating the contents of the will in more detail, or considering the validity of any of the trusts attempted to be created, enough has been said to enable us to consider the only question involved in the case, and that is, whether the plaintiff's claim was barred by the statute of limitations. This appears to have been the only question considered by the Supreme Court.

A few further facts are now necessary to be stated: Jennings, the executor named in the will of Margaret Dunning, renounced all his "right and claims, to act as executor of the said will," and the renunciation was duly filed on the 29th of January, 1859. On the 11th day of March, 1859, letters of administration, with the will annexed, were duly granted to Mary S. Dunning, the present plaintiff. On the 28th day of December, 1869, Mary S. Dunning was duly appointed by the Supreme Court a trustee to carry out the trusts imposed upon the executor named in the will of Margaret Dunning, and this she accepted; and this action was brought under her supposed authority as trustee under that appointment; and, if the cause of action against the defendant did not, in the sense of the law, accrue until that appointment, it is very clear that the plaintiff was entitled to recover.

It is urged that when the plaintiff was granted letters of administration with the will of Margaret Dunning annexed, on the 11th of March, 1859, the cause of action in the present case accrued, and that she might, in that capacity, assert in the courts her right to recover all the assets belonging to the estate of the testatrix, Margaret Dunning. This might, indeed, be in every thing regarded as general assets of the estate of the decedent; but in this case a very different question is presented. The farm in question was devoted, in trust, to a special purpose, which does not appear to have had any necessary connection with the disposition of the residue of her estate. We cannot, therefore, dispose of this case without considering the questions whether the plaintiff, as administratrix with the will annexed, succeeded to all the powers in trust intended to

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be confided to the original executor named in the will. If such be the law it is very obvious that the action was barred; and the same result will follow if the plaintiff, when appointed administratrix *cum testamento annexo*, or when the surplus was produced on the foreclosure sale, she had in that capacity an immediate right of action to recover it.

At the common law, an executor or administrator had nothing to do with any thing, save the mere personal assets of the testator or intestate; and it is now the law that an administrator has no further authority, save where, by statute, he may apply to a court of competent jurisdiction, upon a proper state of facts, for the sale of the real estate of his intestate, for the payment of his debts. It is said, in the old books, and the rule is still, to a large extent, preserved, that an executor merely takes by force of the probate of the will, and that this legal office of executor does not necessarily embrace naked powers respecting real estate, specially conferred, or powers coupled with an interest or trust of any kind, and it is not too much to say that the appointment of a trustee, named in a will, of all the personal estate of a testator, would not have made him an executor at the common law. *The King v. Jenkins*, 1 Dowl. & Ryl. 41. The distinction between the mere executorial powers, derived from the probate of a will, and powers given to a person named as executor, in respect to real estate, either naked or in trust, with an interest, has not, I think, always been very carefully considered so far as the adjudged cases enable me to discover. In the case at bar, it is, I think, very obvious that the testatrix intended to make her executor a trustee, with large discretionary power, which he might exercise without any reference to his duty as an executor. This trust duty was not annexed to the office of executor, but was devised to him as a *person*. He might, therefore, accept and execute the trust without proving the will or taking out letters testamentary. He became trustee, and was vested with the trust estate by virtue of the will alone. *Judson v. Gibbons*, 5 Wend. 225; *Conklin v. Egerton*, 21 id. 430; S. C., 25 id. 224; *Roome v. Phillips*, 27 N. Y. 357, 363. This being so, it of course follows that the plaintiff, as administratrix, with the will annexed, did not succeed to any right concerning the trust estate, which she, by virtue of that office, could enforce, unless, upon her application to some court of competent jurisdiction, the real estate embraced in the trust might be ordered sold for the payment of the debts of the testatrix. The farm in question having been devised by the will to Jennings, the executor named, it might be assumed, if nothing to the contrary was shown, that he had accepted the trust. In such a case his right of action to recover the trust estate or its proceeds, or the surplus money in dispute, would accrue at once, and, if not asserted within the proper period of limitation, would be forever barred. The evidence or findings in the present case are quite

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sufficient to establish the fact that Jennings never did, and never intended to, accept the trust. While his renunciation of the office of executor would not necessarily divest him of his right to execute the trust, it is some evidence that he intended to have nothing to do with the estate, and it abundantly appears, as a matter of fact, that he and all concerned understood that he refused to accept the trust.

It was the practice in such cases, in earlier times, to require the renouncing trustee to execute a release to his associate trustees, or to execute a deed of disclaimer. 1 Cruise, 539. In this case the trustee had no associates, and could make no release; and a formal deed of disclaimer appears not to be regarded as necessary in the present condition of the law. *Burrit v. Silliman*, 13 N. Y. 93; *Townson v. Tickell*, 3 B. & Ald. 31. If the foregoing views are correct, it follows that, until the appointment of the plaintiff by the Supreme Court, on the 28th of December, 1865, as trustee in the place of Jennings, there was no party legally existing in whom a right of action vested to recover the money in controversy. *Bucklin v. Ford*, 5 Barb. 395; Angell on Limitations, §§ 54, 62; *Davis v. Garr*, 2 Seld. 124.

We are referred by the learned counsel for the appellant to chapter 658 of the Laws of 1867 as having some application to the present case, but it has none. The rights of all parties to the surplus in dispute had been irrevocably fixed before the act was passed, and they could not be affected by any subsequent legislation. Besides, the act, in its very terms, cannot be applied to this case, in any possible aspect, so far as I can discover. But as the defendant never paid the surplus claimed into any Surrogate's Court in any supposed compliance with the statute referred to, or to any other court or person, we find no occasion to consider the question further.

The judgment below should be affirmed, with costs.

DWIGHT, C. I concur with Judge REYNOLDS in the disposition of this cause. I desire to add a few words upon a question much discussed on the argument, which is, whether the money in litigation could have been collected by the administrator on the theory that it was personal property. This depends upon the correct application of the doctrine of "equitable conversion." In order to become personal estate for the purposes of administration, the money must have belonged to the decedent as personalty. Whatever once descended to her heirs or devisees cannot be divested from them, except for the purpose of liquidating some superior claim. After that has been satisfied, any surplus belongs to the heir or devisee, on the theory that it stands in the place of, and represents, the original fund.

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The conversion of the land into money was only made for a special purpose; and that having been accomplished, the surplus, by a fiction of equity, is reconverted into land.

The truth of this view can be easily shown by supposing that the mortgaged property had consisted of separate lots, and no more had been sold on the foreclosure than was necessary to satisfy the mortgage. The unsold residue would then, of course, belong to Mrs. Dunning's heirs or devisees. Could it possibly have made any difference, if the lots had happened to be sold and a surplus realized? If so, this would be to make the rights of heirs and devisees depend upon accident rather than upon principle. As this property once belonged to the devisee in trust, and for the space of time between the date of the testatrix's death and that of the foreclosure, the surplus which represents in equity that estate, still belongs to the devisee. An action to recover it could be brought by no other person. The devise, owing to the renunciation of Jennings, not being in existence until an appointment was made December 28th, 1869, the statute of limitations did not begin to run until that time, and, of course, is no bar to this action.

These views are clearly sustained by the authorities. *Wright v. Rose*, 2 Sim. & Stuart, 323, is distinctly in point. In that case the mortgage contained a power of sale with a direction that the surplus money should be paid to the mortgagor, his executors or administrators. The interest on the mortgage having remained unpaid, the mortgagee sold the estate after the mortgagor's death, under the power of sale, for a sum which considerably exceeded the mortgage money and interest. The action was brought by the plaintiffs as administrators of the mortgagor, for an accounting as to this surplus. The bill was demurred to by the defendant, on the ground of want of equity. The court said, that if the estate had been sold by the mortgagee in the life-time of the mortgagor, then the surplus money would have been personal estate of the mortgagor, and the plaintiff would have been entitled. But the estate being unsold at the death of the mortgagor, the equity of redemption descended to the heir, and he is now entitled to the surplus produce. See also, to the same effect, *Polley v. Seymour*, 2 Yo. & Coll. 721; *Brown v. Bigg*, 7 Ves. 279; *Bourne v. Bourne*, 2 Hare, 39; *Matson v. Swift*, 8 Beavan, 374; *Van v. Barnett*, 19 Ves. 102; *Biggs v. Andrews*, 5 Sim. 424; Dalzell on the Law of Equitable Conversion, 89; *Varnum v. Meserve*, Allen, 160.

The Massachusetts cases hold that the executor or administrator may bring the action for the surplus when the mortgage provides that it shall be paid to the mortgagor, his "executors or administrators." They recognize the doctrine that a surplus, under such circumstances, is usually

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real estate, but declare that the equity of redemption in mortgaged lands is but a trust estate, and that the legal title to the money is in the executor or administrator by force of the contract with the mortgagee, and that when he collects it he holds it in trust for the heirs or devisees, as the case may be. *Varnum v. Meserve, supra*. These views cannot prevail here. The equity of redemption is a legal estate in New York. The case of *Varnum v. Meserve* is in direct opposition to *Wright v. Rose, supra*, where the promise was also made to pay the mortgagor, his "executors or administrators." The true construction of those words undoubtedly is, that the promise is to pay the executors or administrators whenever it might have been collected by the mortgagor, as *e. g.*, where the land was sold in his life-time.

The statute of 1867, chapter 658, cited on the argument, is not in the way. This act lends no countenance to the theory that the present surplus is to be regarded as personal property. On the other hand, it is carefully framed on the supposition that it is real estate. The first section provides that the surplus shall be paid over to the surrogate of a court having jurisdiction to entertain an application for the sale, or mortgage, or lease of the real estate of a deceased person for the payment of debts. The second section requires that the surrogate shall, upon the application of an executor, administrator or *creditor*, made in the same manner as upon proceedings for the sale, etc., of land, make an order disposing of the surplus moneys as proceeds of real estate.

This section has, as would appear, only a limited scope, and is simply designed to provide a method for applying the surplus to *the payment of debts*. It makes no change in the law as to the proper person (considered as owner) to bring an action for the surplus. The terms of the statute show that the surplus is regarded as real estate. The most careful precautions are taken to prevent the heirs from being deprived of it, except in the same manner and to the same extent that would be permitted in case the land had remained unsold.

The judgment should be affirmed.

All concur.

Judgment affirmed.

WESTCOTT v. FARGO, appellant.

(61 N. Y. 542.)

Carrier — express company — conditions in receipts.

Plaintiff delivered to an express company a package for transportation, and received a receipt providing that the company should not be liable for any loss or damage (1) "to any box, package or thing for over fifty dollars, unless the true value thereof is herein stated;" nor (2) "unless the claim therefor shall be made in writing within thirty days from the accruing of the cause of action." *Held*, (1) that the first condition did not include a loss occasioned by the company's negligence, and (2) that the second condition could not be enforced unless pleaded.

ACTION against the president of the American Merchants' Union Express Company to recover the value of a package of furs belonging to plaintiff, and which were delivered to defendants' company in New York for transportation, and lost *en route*.

When the package was delivered to defendant the consignor gave to the company's agent the following receipt, partly printed and partly written, which was signed and returned to the consignor.

"NEW YORK, *January 7, 1870.*

"Received of J. Ruszits one bale, said to contain valued at
dollars, marked Geo. Westcott & Co., Utica, N. Y., which we undertake to carry to the nearest point of destination reached by this company, subject expressly to the following conditions: This company is not to be liable for any loss or damage, except as forwarders only, nor for any loss or damage by fire. * * * Nor shall this company be liable for any loss or damage of any box, package or thing for over fifty dollars, unless the just and true value thereof is herein stated; nor upon any property or thing, unless properly packed and secured for transportation; nor upon any fragile fabrics, unless so marked upon the package containing the same; nor upon any fabrics consisting of or contained in glass. This company will not be liable for any loss or damage, unless the claim therefor shall be made, in writing, within thirty days from the accruing of the cause of action, in a statement to which this receipt shall be annexed. The party accepting this receipt hereby agrees to the conditions herein contained."

The value of the package was \$1,104, but neither the company nor its

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agent had any knowledge that its value exceeded \$50. Plaintiff demanded the package of defendants' company, but it was not delivered. The consignee was agent of plaintiff.

The referee found "that the allegations of the complaint numbered one, two, three and four were true," and the plaintiff claimed that this was a finding of negligence on the part of the company, but this the company disputed on the ground that the allegations of the complaint were not numbered.

Plaintiff made no claim, in writing, within thirty days, as required by the receipt.

The referee decided as matter of law that the plaintiff was entitled to recover the value of the package with interest, and the judgment entered thereon was affirmed at General Term.

The plaintiff was stockholder in defendant's company, and it was preliminarily objected that he could not maintain the action as it would be in the nature of an action against himself and others, but the court held that under the statute he could.

Francis Kernan, for appellant. The receipt given to plaintiff by the express company is the contract by which the rights of the parties in this case are to be controlled. *Long v. N. Y. C. R. R. Co.*, 50 N. Y. 76; *Belger v. Dinsmore*, 51 id. 166; S. C., 10 Am. Rep. 575; *Steers v. N. Y. & P. S. S. Co.*, 15 Am. Rep. 453. Under the contract defendant became an ordinary bailee and forwarder for hire, according to the terms of the same. *Dorr v. N. J. St. Nav. Co.*, 11 N. Y. 485, 493; *Sunderland v. Westcott*, 40 How. 468; *Hooper v. Wells, Fargo & Co.*, 5 Am. L. Reg. (N. S.) 16. Defendant was only liable for loss or damage by negligence, and such negligence will not be presumed, but must be affirmatively shown. *Lamb v. C. & A. R. R. & T. Co.*, 46 N. Y. 272; S. C., 7 Am. Rep. 327; *Cochran v. Dinsmore*, 49 id. 249; *French v. B., N. Y. & Erie R. R. Co.*, 4 Keyes, 108; *Moore v. Evans*, 14 Barb. 530. The evidence will not warrant a finding of loss by negligence. *Burrell v. N. Y. C. R. R. Co.*, 45 N. Y. 184; *Moore v. Evans*, 14 Barb. 530. The damages should be limited to \$50. *Belger v. Dinsmore*, *supra*; *Wetzell v. Dinsmore*, 45 N. Y. 496; *Cragin v. N. Y. C. R. R. Co.*, 51 id. 64; S. C., 10 Am. Rep. 559; *Warner v. West. Tr. Co.*, 5 Robt. 490; *Merrill v. Grinnell*, 30 N. Y. 594, 615, 616; *Orange Co. Bk. v. Brown*, 9 Wend. 115. The failure to present a written claim within thirty days, as required by the contract, prevented a recovery. *Roach v. Ins. Co.*, 30 N. Y. 546.

Charles Mason, for respondent.

DWIGHT, C. [after deciding a question of practice]. The defendant further objects that it is not liable because "no claim was made in writing within thirty days from the accruing of the cause of action," according to a stipulation in the contract under which the package was sent. It is urged that this clause is in the nature of a condition precedent to the plaintiff's right to recover, and that as no such claim has been made, there is no right of action.

I do not think that this construction is correct. The clause in question assumes that the plaintiff has a "cause of action," which has already "accrued" to him before the thirty days commenced to run. In that view the provision is in the nature of a statute of limitations, and should have been set up in answer. As that was not done, the defendant cannot avail himself of it. Had we come to the conclusion that the clause was a condition precedent, the question would have been open to consideration whether so short a time was reasonable. See *Adams Express Co. v. Reagan*, 29 Ind.; *Southern Express Co. v. Caperton*, 44 Ala. 101; S. C., 4 Am. Rep. 118.

The facts of the case must now be considered on their merits.

The true question in the cause concerns the effect upon the parties of the stipulation that the defendant should "not be liable for any loss or damage of any box, package or thing for over fifty dollars, unless the just and true value is herein stated."

It must be conceded that this stipulation, under the circumstances of this case, is a part of the contract, and is binding on the plaintiff. This is decided in *Belger v. Dinsmore*, 51 N. Y. 166; S. C., 10 Am. Rep. 575, and in *Steers v. Liverpool Steamship Co.*, 57 id. 2; S. C., 15 Am. Rep. 453.

The only question open for discussion is the correct construction of the words used. Does the phrase "any loss or damage" include losses, etc., caused by the negligence of the defendant? It is claimed by the defendant that there was no finding by the referee that it was guilty of negligence. The plaintiff controverts this position. The difference between the parties is occasioned by the referee's finding that certain propositions numbered in the complaint were true, without setting forth exact facts, and there is a controversy as to the propositions represented by the numbers. The allegation of negligence was set up in the complaint; there was evidence to sustain it at the trial, and it is difficult to suppose that the learned and experienced referee who tried the cause did not find one way or the other upon the subject. At all events, there was sufficient evidence to support such a finding. The property in question was proved to be in the custody of the company, at its office in New York, and thereafter no trace of it can be found. The defendant

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gave no satisfactory explanation of the loss. True, one Brownson, the defendant's agent, made inquiries for the package, and found that it, or a corresponding package, was put on a shipping bill for Utica on January 17th, 1870, but could obtain no further trace of it. As far as appears, he made no effort to find it, except by inquiring by letter concerning it, and by examining the company's books. These facts serve to show negligence within the ruling in *Steers v. Liverpool Steamship Company, supra*. The question is thus distinctly presented whether the words in the receipt, that "this company will not be liable for any loss or damage of the box, package or thing for over fifty dollars, unless the just and true value thereof is herein stated," will exempt the defendant from liability for a loss occasioned by the negligence of its servants.

It was suggested in the argument, on the part of the appellant, that this case should be disposed of in his favor, on the ground that it was a fraud on the part of the plaintiff's agent toward the defendant not to have disclosed the true value of the goods, when called upon to do so, which would either have defeated the recovery altogether, or at least have reduced it to fifty dollars. This point, however, was not presented at the trial, nor was this defense distinctly, if at all, set up in the answer. Under the circumstances we do not think that theory open to consideration. Had it been, it would have been necessary to consider such cases as *Clay v. Willan*, 1 H. Black. 298; *Izett v. Mountain*, 4 East, 370; *Nicholson v. Willan*, 5 id. 507; *Bignold v. Waterhouse*, 1 M. & S. 259; *Batson v. Donovan*, 4 Barn. & Ald. 21, and opinion of HOLROYD, J., and kindred cases, in which this aspect of the case and its relations to the question of negligence have been fully considered in the English courts.

Dismissing this topic of fraud, it is only necessary to examine the point whether the clause in the defendant's receipt is sufficient to exempt it from losses occasioned by negligence. This point must now be regarded as settled by recent decisions in this court and in the Court of Appeals. Reference may be made to *Belger v. Dinsmore*, 51 N. Y. 166; S. C., 10 Am. Rep. 575; *Steers v. Liverpool, New York and P. Steamship Co., supra*; *Magnin v. Dinsmore*, 56 N. Y. 168. The result of these cases is, that it is lawful for a carrier to make such a contract as was entered into in the present case, exempting him from liability, and that he may, by *clear and distinct expressions*, relieve himself from losses occasioned by his own negligence. On the other hand, general words, "such as that he will not be liable for loss, or detention, or damage," are not to be construed to extend to losses, etc., occasioned by negligence. The words are to be taken most strongly against the party whose language they are, and who is in an advantageous position in fixing the terms of the contract.

The case of *Magnin v. Dinsmore, supra*, so closely resembles the present case as in substance to govern it. The contract contained the following clause: "It is further agreed and is part of the consideration of this contract, that the Adams Express Company are not to be held liable or responsible for the property herein mentioned, for any loss or damage arising from the dangers of railroad, ocean, steam or river navigation, etc., or unless specially insured by them, and so specified in the receipt; * * * and if the value of the property above described is not stated by the shipper, the holder thereof will not demand of the Adams Express Company a sum exceeding fifty dollars for the loss, or detention of or damage to the property aforesaid." The Court of Appeals held, that the clause requiring insurance must be regarded as distinct from that referring to a disclosure of value. Accordingly, the losses referred to under the latter clause must be other than those specified in the former, which were of the dangers of railroad, ocean and steam navigation, etc.

Under the last clause of the contract, the jury found a verdict for the plaintiff for fifty dollars, no value having been stated by the shipper at the time of making the contract, though the goods were worth upwards of \$1,400. It appeared, however, that the package had never been delivered to the consignees, nor was any explanation of the failure to deliver shown by the carrier. The Court of Appeals held, that there was sufficient evidence of negligence to go to the jury, and that the judgment of the court below must be reversed, since there was no clear expression of intent in the carrier's receipt to exempt itself from losses occasioned by its negligence. The result in the case at bar, in the court below, as reported in 6 Lansing, 319, was approved.

We are unable to distinguish *Magnin v. Dinsmore*, in any material respect, from the present case. There were in the case under discussion clauses exempting the defendants from the dangers of navigation, and act of God. etc., entirely distinct from that now under consideration. The words affecting the decision of this cause were simply these: "Nor shall this company be liable for any loss or damage of any box, package or thing for over fifty dollars, unless the just and true value thereof is herein stated." There is in this phraseology no such clear and distinct expression of exemption from loss by negligence as the case of *Magnin v. Dinsmore* requires, and it has been already shown that there was, as in that case, sufficient evidence of negligence to justify a finding to that effect.

The judgment of the court below must be affirmed.

All concur.

Judgment affirmed.

De Grove v. The Metropolitan Insurance Company.

DE GROVE v. THE METROPOLITAN INSURANCE COMPANY, appellant.

(61 N. Y. 594.)

Insurance — parol contract to insure.

Plaintiff applied to defendant's agent for a policy of marine insurance on certain goods, and paid the premium. The agent said it was not his custom to give a policy, and that it was unnecessary, and gave him a receipt specifying the risk insured, but containing no conditions. *Held*, that the contract was governed by the limitations and conditions contained in the policies ordinarily used by the Company. (See note, p. 309.)

PER EARL.—An agent of an insurance company has apparent authority to insure in the modes authorized by the company's charter, and upon the terms and conditions inserted in their policies in ordinary use.

ACTION upon a contract of insurance. It appeared that defendant carried on the business of fire and marine insurance; that each was conducted separate and apart from the other; that in 1865 one Grannis was its agent at Macon, Ga., for the business of fire insurance; that he applied for authority to act as agent for marine insurance, and that the company authorized him so to act, sending him one open policy, 100 notices of indorsement to be forwarded as each risk was taken thereon, and twenty-five blank marine policies. The open policy insured Grannis "for whom it may concern as hereon indorsed," and contained a condition, as did also the blank marine notices,—that no loss would be paid unless amounting to five per cent. and that no action on the policy should be sustained unless commenced within twelve months next after the loss.

On December 12, 1865, plaintiff's assignees applied to Grannis for a policy on the cotton mentioned below, but was informed by the agent that a policy was not necessary, that it was not his custom to give one, but he received the premium and gave him the following receipt therefor:

"E. C. GRANNIS, GENERAL INSURANCE AGENCY, MACON, GEORGIA."
No. 16. \$8,000.

"Received of Johnson, McMahon & Co., of Macon, Ga., \$100 premium on their application to the Metropolitan Insurance Company of New York, for insurance on \$7,000 for the term of trip from Macon, Georgia, to New York, on the following property, to wit: On forty-one bales of cotton from Macon to Alexandria, by railroad, on box car, and by steamer from Alexandria to New York. Dated at Macon, this 12th day of December, 1865.

"E. C. GRANNIS, *Agent*."

The risk was reported to the company as a marine risk and was entered by the agent on the open policy issued to him.

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The cotton was shipped December 14. Part of the cotton was injured *en route*, and in May, 1866, plaintiff's assignors notified Grannis that two bales had been damaged, and August 11, made out their proof of loss at \$306. The defendants refused payment because the loss was not five per cent. In December, 1866, assured furnished further proofs of loss and the company again declined—though not until January, 1867—to pay, on the same ground. The action was commenced August 27, 1869. The defendant's answer set up the condition in their usual policies, limiting the right of action to twelve months after the loss, and also that no loss would be paid unless amounting to five per cent. On the trial, plaintiff proved loss equaling five per cent.

The court found that there was no agreement between plaintiff's assignor and defendant's agent, making the conditions in the policies a part of the contract; that such conditions were not communicated to him nor known to him; but that, if such conditions constituted a part of the contract, they had been waived by defendant, and ordered judgment for plaintiff for \$463 and interest from February, 1867, thirty days after defendant's first refusal to pay. The General Term affirmed the judgment and defendant appealed.

Samuel Hand, for appellant.

Henry Broadhead, for respondent. Strict proof of loss was unnecessary. *O'Neil v. Buff. F. Ins. Co.*, 3 N. Y. 122; *Bumstead v. Dividend Ins. Co.*, 12 id. 81. The parol contract of insurance was valid and could be enforced without a policy, and the action of defendant's agent amounted to a waiver of the provisions of its policies as to strict proofs and suit within one year. *Ide v. Phoenix Ins. Co.*, Alb. L. J., July 9, 1870; *Ames v. N. Y. U. Ins. Co.*, 14 N. Y. 253, 264; *Post v. Aetna Ins. Co.*, 43 Barb. 351; *People v. Liv. L. and G. Ins. Co.*, 2 N. Y. S. C. 273, 274. This was a parol insurance uncontrolled by a policy. *Kelly v. Comm. Ins. Co.*, 10 Bosw. 82; *Fish v. Cottenet*, 44 N. Y. 538; *Bodind v. Ex. F. Ins. Co.*, 51 id. 117; *Sanbourn v. Fireman's Ins. Co.*, 82 Mass. 44. The waiver of conditions was found at Circuit as a matter of fact and cannot be reviewed. *Bowman v. Agri. Ins. Co.*, 2 N. Y. S. C. 266; *Baker v. Spencer*, 47 N. Y. 533, 565. The retention of the proofs was a waiver of all objections to them. *Bush v. West. F. Ins. Co.*, 2 N. Y. S. C. 632; 4 Bosw. 1; 2 N. Y. 53; 57 Barb. 578; 23 Wenl. 525; *Dolm v. Fireman's Ins. Co.*, 5 Lans. 275.

EARL, C. The defendant is a domestic corporation, organized under chapter 308, Laws of 1849, chapter 2, Laws of 1853, and chapter 106,

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Laws of 1863, and it was authorized by its charter to engage in fire insurance, and in marine and inland transportations and navigation insurances.

It was engaged in both kinds of insurance, kept each kind separate in separate books, and had different policies for each. Grannis, defendant's agent at Macon, was authorized to engage in both kinds of insurance, and had blanks for both kinds.

On the 12th of December, 1865, McMahon, one of the assured, applied to Grannis for an insurance upon the cotton, and asked him for a policy. Grannis informed him that it was not his custom to give a policy, that it was an unnecessary expense, and that it was his custom to give such a paper as the receipt dated December 12, 1865, which was binding, and he, as a witness for plaintiff, testified that, in all cases where a policy was asked for, one was made out and given to the party insured, and the receipt was taken up, if one had been previously given, as he invariably told parties insuring that it was better to have the company's policy in case of loss. He reported the insurance to the company as a marine risk, and it was entered upon the open marine policy, which had been issued to him for the purpose of such risks, and was manifestly understood by him and the company as a risk in the marine department.

The plaintiff claims that the receipt embodies the whole contract of insurance, and hence, that the conditions set up in the answer have no application. The defendant claims that this was a mere application for a policy, and that a contract of insurance must be looked for in the form of marine policy used by the company, upon which the risk was indorsed. The judge at Special Term upheld the plaintiff's claim, and the important question for us to determine is, whether this holding was correct.

According to plaintiff's claim this was a general insurance against every kind of risk, an insurance that the cotton would safely reach its destination. There were no limitations or conditions in the contract. It was an absolute unconditional insurance against every thing. Such an insurance Grannis had no authority to make. He was authorized to engage in the two kinds of insurance which the company, by its charter, was authorized to make; and he was to insure upon the terms, conditions and limitations mentioned in the blank policies with which he was furnished. Neither was it within the scope of his apparent authority to make such an insurance. It is not probable that any agent ever had such authority, or that any company was ever authorized to engage in such insurance. He was the known agent of a company engaged in fire and marine insurance, and such an agency gave him apparent authority only to insure in the modes authorized by the company's charter, and upon

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the terms and conditions inserted in their policies in ordinary use. No one could presume, from the fact of his agency for such a company, that he was authorized to make such an insurance as is claimed. Hence, if we assume that the receipt is a complete contract of insurance, and that embodies the whole contract, it would not, being in excess of the agent's authority, bind the company. But the receipt is not a complete contract of insurance. It does not purport to be. It is evidently inchoate. It does not even state that the insurance is against loss or damage from any cause. It does not specify the peril or risk insured against, and this every insurance policy must do. 1 Phil. on Ins., § 35; *Baptist Church v. Brooklyn Ins. Co.*, 28 N. Y. 153, 161, 164; *Tyler v. New Amsterdam Ins. Co.*, 4 Robt. 151. Hence, if the plaintiff were obliged to stand upon this receipt as his only policy, he would fail in the action for the want of a complete contract in which the minds of the parties had met. This receipt must, therefore, when considered in connection with the parol evidence, be treated as a mere application for insurance, as evidence that the assured had paid the premium and were entitled to be insured from its date. *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y. 402; S. C., 10 Am. Rep. 495. The assured must be held to have known the general character of business done by defendant. They went to the agent to be insured on their cotton in transit from Macon, by railroad and water, to New York, and for that purpose needed, and must have expected, a policy appropriate to the subject-matter and the perils to be insured against, and, hence, they must have intended to procure an inland policy, or what is sometimes mentioned in the evidence as a marine policy. Such an insurance was intended by the agent and was understood by the defendant; and it was such an insurance which the assured must have expected. Every business man knows that all insurance companies have forms of policies in common use which contain the terms, limitations and conditions to be inserted in all contracts of insurance. They must have expected an insurance upon the usual terms. It cannot be presumed that they expected a special contract variant from the usual terms imposed by the company. The assured went to the agent, asked for a policy, paid the premium, mentioned the subject-matter of insurance, and the route and destination of the cotton, and left it to the agent to see that their insurance was entered in the proper department of the company, expecting to be insured in the ordinary way. They were assured that the receipt was binding, as it really was. Binding to what? Binding to an insurance in the usual form. Suppose the assured had returned the receipt and demanded a policy, what kind of a policy could they have compelled the defendant to issue? Clearly one in its usual form

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and no other. Ang. on Ins., § 37 ; Phil. on Ins., § 15 ; *Ellis v. Albany City Fire Ins. Co.*, *supra*. It is said in Phillips that a memorandum that a subject "is insured," or "shall stand insured," means that "it is insured, or shall be so, according to the ordinary form of policy used in the office where the memorandum is made." We must, therefore, look to the marine and inland policies used by the company, upon one of which this risk was indorsed, for the limitations and conditions contained in the contract of insurance.

[In the remainder of the opinion the facts were reviewed and it was stated that there was error in not allowing the defendant the benefit of the condition "that suit must be brought within twelve months after loss ;" and also of the condition that loss under five per cent. should not be paid, the plaintiffs being held concluded by the amount of loss which they claimed in their proof furnished the company. The opinion, which we have not deemed it necessary further to give, having stated the "two grounds," concludes as follows :]

Upon the two grounds above mentioned, therefore, I favor a reversal of the judgment and a new trial, costs to abide event.

All concur, on the ground that plaintiff's rights are to be governed by such a policy as the assured was entitled to have upon his application.

Judgment reversed.

NOTE —Parol contracts to insure are valid. *Ellis v. Albany City Ins. Co.*, 10 Am. Rep. 495 and note; *Id. v. Phoenix Ins. Co.*, 2 Biss. 333; *Angell v. Hartford Fire Ins. Co.*, 17 Am. Rep. 322; *Mobile Ins. Co. v. McMillan*, 31 Ala. 711, even though the company's charter require contracts of insurance to be in writing, etc. *Security Fire Ins. Co. v. Kentucky Marine Ins. Co.*, 3 Am. Rep. 301; *Hening v. The United States Ins. Co.*, 2 Dill. 26; *Commercial Ins. Co. v. Union Ins. Co.*, 19 How. 318; *Ins. Co. v. Cott*, 20 Wall. 560; *Dayton Ins. Co. v. Kelly*, 15 Am. Rep. 612; *Sanborn v. Firemen's Ins. Co.*, 16 Gray, 448; *New England Ins. Co. v. Robinson*, 25 Ind. 536. See otherwise, *Hening v. The United States Ins. Co.*, 4 Am. Rep. 332; *Croghan v. Underwriters' Agency*, 53 Ga. 109; *Lindauer v. Delaware Ins. Co.*, 13 Ark. 461.

In *New England Life Ins. Co. v. Hasbrook*, 32 Ind. 447, it was held that notice of a company's rules regarding payment of premiums did not make such rules part of an oral contract to insure, and that the corporation could make such contracts in violation of its own rules unless its charter expressly prohibited.

It is not necessary to a valid parol agreement to insure that the premium be paid; if credit is given therefor until the policy is delivered, it is sufficient. *Angell v. Hartford Fire Ins. Co.*, 17 Am. Rep. 322. The agent must, however, have power to bind the company. *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180.—REP.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

BOSTON DIATITE COMPANY v. FLORENCE MANUFACTURING COMPANY.

(114 Mass. 69.)

Jurisdiction of court of equity as to slander of title.

The jurisdiction of a court of equity does not extend to cases of libel or of slander or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involve no breach of trust or of contract.

BILL IN EQUITY against the Florence Manufacturing Company, Isaac S. Parsons, George A. Burr and George A. Scott, alleging that the plaintiff corporation was and for three years had been engaged in the manufacture of sundry articles, among which were toilet mirrors, made from a composition, invented and patented by one Merrick, which was capable of being moulded by heat and pressure into various shapes, and that they had applied to this material the trade-mark name "Diatite," by which it was generally known; that the defendant corporation was engaged in the manufacture of toilet mirrors from another material capable of being moulded and pressed, upon which there were no letters patent; that the defendant Parsons was the president, the defendant Burr the treasurer, and the defendant Scott the agent of the defendant corporation; that Parsons, Burr and Scott, acting as such officers and in the name of the corporation, falsely, fraudulently and maliciously, and for the purpose of injuring the plaintiff and diverting its trade, represented to the plaintiff's customers that the articles manufactured by the

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plaintiff under its letters patent were manufactured in infringement of letters patent owned by the defendant corporation, and that the defendant corporation was prosecuting a suit against the plaintiff corporation for such infringement. The bill then set forth specific instances in which persons, in the bill named, who intended to make purchases of the plaintiff, had been deterred therefrom by oral and written representations, of the purport above set forth, made to them by the defendants, and had been induced to purchase of the defendant corporation.

The bill prayed that the defendants might be enjoined from making such representations, that the defendant corporation might be decreed to account for the profits of its sales made by reason of such false representations.

The defendants demurred, because the plaintiff had not stated a case which entitled it to the relief prayed for.

D. W. Bond, for defendants.

T. W. Clarke, for plaintiff.

GRAY, C. J. The jurisdiction of a court of chancery does not extend to cases of libel or slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involve no breach of trust or of contract. *Huggonson's case*, 2 Atk. 469, 488; *Gee v. Pritchard*, 2 Swanst. 402, 413; *Seeley v. Fisher*, 11 Sim. 581, 583; *Fleming v. Newton*, 1 H. L. Cas. 363, 371, 376; *Emperor of Austria v. Day*, 3 De G., F. & J. 217, 238-241; *Mulkern v. Ward*, L. R., 13 Eq. 619. The opinions of Vice-Chancellor MALINS in *Springhead Spinning Co. v. Riley*, L. R., 6 Eq. 551, in *Dixon v. Holden*, L. R., 7 Eq. 488, and in *Rollins v. Hinks*, L. R., 13 Eq. 355, appear to us to be so inconsistent with these authorities and with well-settled principles, that it would be superfluous to consider whether, upon the facts before him, his decisions can be supported.

The jurisdiction to restrain the use of a name or a trade-mark, or the publication of letters, rests upon the ground of the plaintiff's property in his name, trade-mark or letters, and of the defendant's unlawful use thereof. *Routh v. Webster*, 10 Beav. 561; *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G., J. & S. 137, and 11 H. L. Cas. 523; *Maxwell v. Hogg*, L. R., 2 Ch. 307, 310, 313; *Gee v. Pritchard*, 2 Swanst. 402.

The present bill alleges no trust or contract between the parties, and no use by the defendants of the plaintiff's name; but only that the de-

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fendants made false and fraudulent representations, oral and written, that the articles manufactured by the plaintiff were infringements of letters patent of the defendant corporation, and that the plaintiff had been sued by the defendant corporation therefor; and that the defendants further threatened divers persons with suits for selling the plaintiff's goods, upon the false and fraudulent pretense that they infringed upon the patent of the defendant corporation. If the plaintiff has any remedy, it is by action at law. *Barley v. Walford*, 9 Q. B. 197; *Wren v. Weild*, L. R., 4 Q. B. 730.

Demurrer sustained and bill dismissed.

BROUGHTON V. SILLOWAY.

(114 Mass. 71.)

Auction — terms of sale — cash payment.

When the terms of a sale by auction require a cash payment, the auctioneer has no authority to receive as payment a check upon a bank in which the drawer has at the time no funds; and the vendor is not bound by the act of the auctioneer, though he omits to notify the vendee that he repudiates it.

CONTRACT for a refusal by the defendant to deliver to the plaintiff a deed of a parcel of land in Brighton, offered for sale by the defendant at an auction sale at which the plaintiff was the highest bidder.

At the trial in the Superior Court, before LORD, J., it appeared that the plaintiff was the highest bidder at the auction, and that he signed the contract of sale; that the contract provided that \$500 should be paid at the time of sale; that the plaintiff, after the sale, which was on Thursday in the afternoon, gave his check for \$500 to the auctioneer, who gave a receipt therefor as for \$500 received; that the check was given in a house that was on the land; that the defendant was at the auction, but was not in the house where the settlement was made; that at the time the check was drawn and till about noon on Saturday there were no funds in the bank upon which it was drawn to meet it; that on Friday, the day after the auction, the plaintiff requested the auctioneer to hold back the check that the plaintiff might get notes discounted to provide funds to meet it; that the auctioneer told the plaintiff that he could not retain it, but that unless it was paid that day the sale would be off; that the check was deposited between 11 and 12 on Friday; that the

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defendant was first informed of the facts on Saturday in the morning; that he then forbade the auctioneer from proceeding further in the business, revoked his agency, and stated that he should not go on with the bargain, as the conditions of sale had not been complied with by the plaintiff but that he gave no notice thereof to the plaintiff, and that he caused inquiry to be made for the check at the auctioneer's bank and at the Mount Vernon National Bank, on which bank it was drawn, but could not find it.

The auctioneer testified that pursuant to the usual course of business he should have had a return from the check by 10 o'clock Saturday morning. It further appeared, without contradiction, that at 12 o'clock on Saturday the plaintiff succeeded in borrowing \$500 and in placing the same on deposit in the Mount Vernon Bank; that the check was subsequently presented during bank hours of that day and paid on presentation; that the amount of the check never went into the hands of the defendant, who refused to receive it, but remained in the hands of the auctioneer, and was subsequently repaid by him to the plaintiff, who received it under an agreement that the receipt should be without prejudice; that on Saturday afternoon at about 3 o'clock, and while the money was to the auctioneer's credit in his bank, the parties met for the first time after the defendant had discovered the facts about the check; that the defendant informed the plaintiff that he should go no further with the sale, as the plaintiff had given him a fraudulent check, and had failed to comply with the terms of the sale, and was not entitled to a deed; and that the defendant afterward, and before the time within which by the terms of the sale he was to deliver a deed to the plaintiff, sold the land to a third person.

The defendant contended, and asked the court to rule, that he was entitled to a verdict, and asked the court to rule as follows:

"That the auctioneer had no authority to take a check instead of cash, at all events a check drawn on a bank in which the plaintiff had, at the time of drawing the same, no funds.

"That if the auctioneer had, by virtue of his position, authority to take a check and did take one, yet if before the check was paid the defendant ascertained that the check did not represent funds, he could revoke the authority of the auctioneer, and if he did so immediately upon ascertaining the facts, the subsequent payment of the check to the auctioneer would be without authority, and would not be such a payment as would be a compliance with the terms of sale and entitle the plaintiff to a deed."

But the court submitted the case to the jury on the following instruc-

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tions: "If Silloway was present and saw the check taken, or if the check was taken in his absence, and was drawn against funds, and good in the ordinary course of business, the plaintiff can recover. If the defendant, having ascertained that the check was drawn against no funds, repudiated the contract, he had a right to do so; if he did so the plaintiff cannot recover. If he did not repudiate the contract, and the check was subsequently paid on its first presentation at the bank upon which it was drawn and in the usual course of business, then the plaintiff is entitled to recover. Mere revocation of agency would not be of itself necessarily a repudiation of the contract. Merely saying to the auctioneer that he was no longer an agent would not affect this, if the contract, having been already partly performed, was subsequently carried out by the payment of the check in the usual course of business, without notice of revocation of the agency of the auctioneer. If the contract was subsequently carried out, the plaintiff can recover; otherwise he cannot."

Other instructions, as to the contract, and what was performance, and what failure to perform, were given, which were not objected to. The jury returned a verdict for the plaintiff, and the defendant excepted.

W. W. Warren, for defendant.

A. A. Ranney, for plaintiff.

GRAY, C J. The terms of the contract of sale requiring \$500 to be paid down, the auctioneer had no right, by virtue of his employment as such, and without express authority, to bind the defendant by accepting as cash a check drawn against a bank in which the drawer had at the time no funds. *Sykes v. Giles*, 5 M. & W. 645; *Williams v. Evans*, L. R., 1 Q. B. 352; *Taylor v. Wilson*, 11 Metc. 44; Story on Agency, § 209.

There was no evidence in the case that the drawer had funds in the bank when the check was drawn, or that the defendant knew that the auctioneer had taken a check until the second day afterward, or ever assented to or ratified the taking of the check. The act of the auctioneer in taking the check being unauthorized, it was not necessary for the defendant to repudiate it.

It follows that the defendant was entitled to the first instruction requested, and that the instructions given did not meet the requirements of the case.

Exceptions sustained.

Parker v. Moulton.

PARKER V. MOULTON.

(14 Mass. 99.)

False representations on sale of land

False representations as to the condition, situation and value of real estate, knowingly made by the vendor to the purchaser, are not actionable, unless the purchaser has been fraudulently induced to forbear inquiry as to their truth; and, in such case, the means by which he has been thus induced to forbear inquiry must be specifically set forth in the declaration.*

COLT, J. This is an action of tort. The defendant demurs to the declaration, which, in the first count, alleges in substance that the defendant, intending to defraud the plaintiff, represented that he owned a dwelling-house, in good repair and well finished, upon a lot of land in Somerville, of the value of \$2,000, with several other lots of level land in Melrose, near the railroad station, each of the value of \$200; that the plaintiff had no opportunity to see these lots, but relying on the representations of the defendant, agreed to exchange certain real estate he owned in Canada for the defendant's land in Somerville and Melrose, and to pay him a sum of money secured by note and mortgage on the Somerville property; that he delivered to the defendant a deed of the Canada land, and left with a third party the note and mortgage, to be delivered when the deed of the Melrose property was delivered to him by the defendant. It is then alleged that the defendant fraudulently obtained the plaintiff's note and mortgage, without giving or offering to give any deed of the Melrose property, and concludes by charging that all the representations as to the condition and finish of the dwelling-house in Somerville, and as to the character and situation of the Melrose property, and the value of the several lots, were false and fraudulent.

The second count contains no material allegations in addition to those in the first count, except that it is alleged that the plaintiff was prevented by the defendant's artifice from making an examination of the Somerville and Melrose property.

The cause of action thus set forth must be treated as an action on the case for deceit, founded upon false affirmations respecting real estate of which the defendant was the seller. The affirmations here set forth as between buyer and seller, it has been repeatedly decided, will not

* See *Ellis v. Andrews*, 15 Am. Rep. 379; 13 Alb. Law Jour. 160.

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support an action, although the defendant knew them to be false when made. They concern the value of the land or its condition and adaptation to particular uses, which are only matters of opinion and estimate, as to which men may differ. To such representations the maxim *caveat emptor* applies. The buyer is not excused from an examination, unless he be fraudulently induced to forbear inquiries which he would otherwise have made. If fraud of this latter description is relied on as an additional ground of action, it must be specifically set forth in the declaration, and cannot be charged in general terms only. *Gordon v. Parmelee*, 2 Allen, 212; *Brown v. Castles*, 11 Cush. 348; *Veasey v. Doton*, 3 Allen, 380.

It is not attempted to support this declaration on the ground of fraud, practiced in preventing the plaintiff from testing the truth of the defendant's affirmations.

The fraud of the defendant, in obtaining the note and mortgage on the Somerville property, was plainly not intended by the pleader to be alleged as constituting a cause of action. The acts by which it was accomplished are not set forth, and the damages claimed are not attributed to it.

Judgment for the defendant.

G. A. Somerby & B. C. Moulton, for defendant.

W. A. Field & J. D. Fallon, for plaintiff.

RING v NEALE.

(114 Mass. 111.)

Chattel mortgage — trover by second mortgagee.

A second mortgagee of personal property, who is not in actual possession, cannot maintain an action in the nature of trover for its conversion.

TORT for the conversion of personal property. At the trial in the Superior Court, before DEVINS, J., the plaintiff produced a chattel mortgage, under which she claimed title, made to her by one Searle, dated September 4, 1868, and recorded January 19, 1870. It appeared

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that on November 9, 1870, the plaintiff, for breach of the condition of the mortgage, caused a notice in due form of her intention to foreclose it to be served on Searle, and to be duly recorded, but that she never took possession of or removed any of the property. It also appeared that Searle had given to another person a prior mortgage of the same property, dated November 28, 1861, and duly recorded, which had never been paid or discharged; that July 8, 1871, Searle, being in possession of the property, sold and delivered it to the defendant, without the knowledge or consent of the plaintiff or of the first mortgagee; that both mortgages were then overdue; that, by the terms of both mortgages, the mortgagors were entitled to possession till breach of condition; and that at the time of the sale the conditions of both mortgages had been broken, but neither the plaintiff nor the first mortgagee had taken possession of any part of the property.

It was admitted that, prior to the bringing of the action, a demand had been made upon the defendant for the property, and that he had refused to deliver it to the plaintiff.

Upon the foregoing facts the court ruled that the action could not be maintained, and directed a verdict for the defendant, and reported the case at the request of the plaintiff. If the ruling was erroneous, the case was, by agreement of the parties, to be referred to an auditor for the assessment of the damages.

G. W. Morse, for plaintiff.

C. G. Keyes, for defendant.

COLT, J. The declaration is for the conversion of personal property. To maintain the action of tort in the nature of trover, the plaintiff must have the legal title to the property in question, and must show possession or a right to immediate possession. It is not enough that he shows an equitable title, such as a right to redeem, or a reversionary interest subject to the present legal title of another. The whole legal title and right of possession passes to the mortgagee by a mortgage of personal property, and is defeated only by the performance of the condition. The plaintiff's interest in this property is that of a second mortgagee. The legal title and right of immediate possession at the time of the alleged conversion was in the holder of the first mortgage, to whom alone the defendant is liable in this form of action. The defendant cannot be held in two actions of the same kind, at the same time, for the same tort, in favor of different persons. Nor can the rights of the holder of the first

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mortgage be defeated. The law has thus been laid down many times in this Commonwealth. *Landon v. Emmons*, 97 Mass. 37 ; *Rugg v. Barnes*, 2 Cush. 591 ; *Goodrich v. Willard*, 2 Gray, 203.

The plaintiff relies on the case of *Treat v. Gilmore*, 49 Me. 34. It seems to be there decided that the unlawful sale by an attaching officer of personal property subject to a second mortgage would support an action of trover in favor of the holder of that mortgage. But the facts in that case show that the plaintiffs were mortgagees of property, part of which only was subject to the prior mortgage, and the whole of which was sold by the defendant. For this sale the holders of the first mortgage had already recovered a judgment, which of course only covered their interest in the property, and for the amount thus recovered the jury were required to make allowance in their verdict. It would seem that the recovery of the first judgment and its payment operated to discharge the first mortgage, and was properly allowed in mitigation of damages as a payment which had inured to the plaintiff's benefit. So that the rule above given was not necessarily encountered in that case. It is doubtful, at least, whether, without the features indicated, the rule would have been disregarded by that learned court.

No question of laches or fraud on the part of the holder of the first mortgage, or of the validity of that mortgage, was made at the trial. If the plaintiff had intended to rely on such grounds, she should have insisted upon them at the trial, so that they might have been submitted with proper instructions to the jury.

Judgment on the verdict.

THORNDIKE V. BATH.

(114 Mass. 116.)

Sale — delivery, when sufficient.

Evidence that a person seeing an unfinished piano in the maker's shop offered to purchase it of him if he would finish it, that the offer was then and there accepted, that a bill of sale was then and there made, that the price was paid at a subsequent day, the piano being left to be finished, will authorize a jury in finding a delivery of the piano sufficient to pass the title as against a subsequent purchaser.

REPLEVIN for two pianos. The defendant answered denying that the property was in the plaintiff, and asserting property in himself.

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At the trial in the Superior Court, before PUTNAM, J., the plaintiff introduced evidence that he bought the pianos of one Lorenzo Matt, the maker, October 10, 1871, and that in November he took, and continued in, actual possession of them, until they were taken from him by the defendant upon a replevin writ brought by the defendant against Matt, when they were retaken by him from the defendant upon the writ in this action.

The defendant testified that July 27, 1871, Matt applied to him for money, and offered to sell him some pianos which were in process of making at Matt's factory; that Matt and he went together to the factory and looked at four unfinished pianos; that Matt said he would sell them to him and take his notes at four months in payment, and that they would be finished so that they could be sold by him at a profit before the notes became due, and that he would finish them in good style; that the defendant offered to give \$250 apiece for them, if Matt would go on and finish them in good style, so that he, the defendant, could resell them; that Matt accepted this offer, and thereupon made out and gave him a bill of sale of the four pianos, in which they were designated by their numbers; that Matt said he should want the money about the first of the next month; that afterward, August 8, he, the defendant, gave Matt his notes at four months for one thousand dollars in payment; that these notes were negotiated by Matt and paid by the defendant at maturity; that nothing more was said at the time about finishing the pianos; that he went into Matt's place several times afterward, and saw the condition the pianos were in, and inquired of Matt when they would be finished, to which Matt would reply that it was a longer job to finish them than he had supposed it would be; that two of the pianos specified in his bill of sale were the two pianos purchased by the plaintiff October 10, 1871, and replevied by him in this action; that the pianos remained in Matt's factory, and Matt continued to work on them until the two pianos replevied in this action were sold to the plaintiff by Matt, and were taken possession of by the plaintiff.

No other evidence of delivery was offered by the defendant.

The plaintiff requested the court to instruct the jury that upon this testimony there was no evidence of a delivery of the pianos by Matt to the defendant. The court declined to do so, but submitted the question to the jury, under instructions which authorized them to find that there was a delivery, provided they found that the sale was *bona fide*.

The jury found for the defendant, and the plaintiff alleged exceptions

J. L. Thorndike, for plaintiff.

C. Blodgett, Jr., for defendant.

AMES, J. In order that a sale of personal property should go into full effect, so that it cannot be defeated or set aside in favor of a subsequent *bona fide* purchaser of the same property, it is necessary that the first purchaser should show that he had perfected his title by having had actual delivery of it to himself, or by something equivalent thereto. *Lanfear v. Sumner*, 17 Mass. 110; *Parsons v. Dickinson*, 11 Pick. 352; *Packard v. Wood*, 4 Gray, 307; *Veazie v. Somerby*, 5 Allen, 280.

But it often happens, especially in the case of bulky articles, that an effectual delivery is made, although it does not appear that the thing sold was removed by the buyer, or came literally into his personal custody. The books are full of cases in which constructive or symbolic delivery is held to be equivalent to actual delivery, without a visible change of possession. The thing sold may remain in the hands of the seller, and yet the title may pass effectually to the buyer. This has repeatedly been decided in the case of the sale of a horse, which the buyer leaves in the custody of a seller. *Tuxworth v. Moore*, 9 Pick. 347; *Bullard v. Wait*, 16 Gray, 55; *Elmore v. Stone*, 1 Taunt. 458. In the last of these cases, the horse had been removed into another stable, but the court say that that fact was wholly immaterial. It is sufficient if the parties agree that the seller is to retain the possession, not under his lien for the price, but as the agent or bailee of the buyer.

In *Marvin v. Wallis*, 6 E. & B. 726, the seller retained the horse in his possession for his own use, by consent, or in other words as a borrower, as it was held that he was a bailee of the buyer, and that the delivery was sufficient. The possession of the seller continued uninterrupted, but the nature of his holding had changed.

In *Barrett v. Goddard*, 3 Mason, 107, goods lying in a warehouse were sold by marks and numbers, and paid for by a promissory note on six months' credit, it being a part of the bargain that the goods should remain at the option and for the benefit of the buyer at the seller's warehouse, rent free, for the time being. It was held by Mr. Justice STORY that the delivery was sufficient against subsequent purchasers, and that the continuance of possession by the seller did not prevent the delivery from being effectual, if the sale was otherwise complete and nothing remained to be done on the part of the buyer, and if it was a part of the bargain that they should remain with the seller.

In *Beecher v. Mayall*, 16 Gray, 376, it was held that where steam boilers were left in the possession of the seller to be repaired for the buyer, no further evidence of delivery was necessary, for the seller's possession would be in that case the buyer's possession. To the same effect is the decision in *Hotchkiss v. Hunt*, 49 Me. 213, in which the court

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say, by Mr. Justice KENT, that when, by the terms of an agreement of sale, the article sold is to remain in the possession of the vendor for a specific purpose, as a part of the consideration, and the sale is otherwise complete, the possession of the vendor will be the possession of the vendee, and the delivery will be sufficient to pass the title, even against subsequent purchasers.

In the case at bar, the pianos sold to the defendant were designated by their numbers, and sufficiently identified; a bill was made and delivered, the price paid, and the sale has been found by the verdict to have been *bona fide*. Upon the case as presented by the exceptions, we think that the jury were authorized to find that the substance of the transaction between Matt and the defendant was a sale of the four unfinished pianos by Matt to the defendant, an exercise of control by the defendant, and a bailment of the pianos to Matt by the defendant to be finished for him, and a payment by note of the price of the pianos in their unfinished state, and of the labor and material to be furnished by Matt in order to complete them for the defendant. In this state of the evidence, we cannot say that the jury might not rightfully have inferred that the property was so delivered to the defendant as to pass the title, even against a subsequent purchaser.

Exceptions overruled.

McMAHAN V. BOWE.

(114 Mass. 140.)

Deed — by person disseized.

A deed by a person disseized is valid against every one but the disseizor and his privies.

WRIT OF ENTRY to recover a strip of land on I Street, South Boston, the strip being three feet in breadth on the street, and extending back from the street in length forty-five feet. Writ dated June 19, 1871. Plea *nul disseizin*.

I. Knowles, Jr., for demandant.

R. M. Morse, Jr., for tenant.

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MORTON, J. This is a writ of entry. The tenant at the trial denied the seizin of the demandant, and claimed title in himself by adverse possession. The rulings of the court as to his claim of adverse possession were sufficiently favorable to the demandant, and were not excepted to by her. The only question before us is as to the correctness of the rulings upon the issue whether the demandant had proved her seizin.

It appeared that the *locus* was conveyed to the demandant's husband in 1854; that he died in 1862, and that in 1864 his heir-at-law conveyed it to the demandant. There was evidence tending to show that the husband of the demandant was disseized at the time of his death, and that his heir-at-law never entered on the demanded premises, but was disseized when he made his deed to the demandant. It also appeared that the tenant claimed under a deed to him, dated in 1871, which did not include the premises in question, and that he has been in adverse possession of them since his deed. The demandant claimed, and it was held by the court, that the tenant could not tack to his own possession the disseizin, if any, of his grantor, there being no privity of estate between them as to the *locus*. In this aspect of the case, she asked the court to rule that the tenant could only defeat the demandant's title by showing that, at the date of her deed, her grantor was disseized by the tenant himself or by some one under whom he claimed title. The presiding judge refused this ruling, but instructed the jury, in substance, that if her grantor was disseized by any one when he made his deed, the demandant could not recover. To test the correctness of this ruling, we must assume that the disseizin of the tenant commenced at the date of his deed, which was after the deed to the demandant.

The rule that a disseizee cannot convey land was founded partly upon the peculiar nature of livery of seizin under the ancient common law, and partly upon considerations of public policy. Blackstone states the reason of the rule to be, "lest pretended titles might be granted to great men, whereby justice might be trodden down, and the weak oppressed." 2 Bl. Com. 290. The early authorities in this Commonwealth generally state it to be, lest pretended titles be purchased and lawsuits be promoted. 4 Dane's Abr. 8; *Ward v. Bartholomew*, 6 Pick. 409. The reasons have in a great measure ceased to exist, and the tendency of the later decisions is to modify the strict rule as anciently held. *Sparhawk v. Bagg*, 16 Gray, 583.

The authorities in this State, cited by the tenant, show the rule to be established that a deed of a disseizee conveys no title which can be enforced in the name of the grantee, against the disseizor or his privies; but they go no further. It is now held that such deed is good against

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the grantor, and that it entitles the grantee to an action to recover the land, in the name of the grantor, but to his own use, even against the disseizor. *Farnum v. Peterson*, 111 Mass. 148; *Wade v. Lindsey*, 6 Metc. 407; *Cleveland v. Flagg*, 4 Cush. 76. In the case last cited, the tenant held under a deed given to him when his grantor was disseized; but it was held that as he had entered and obtained possession under his deed, he could avail himself of his title in defense to a writ of entry, to avoid circuitry of action.

In *University of Vermont v. Joslyn*, 21 Vt. 52, it was held that a deed by a disseizee was invalid only as to the person holding adversely at the time of the deed, or those who subsequently came in under him; but as to all other persons valid, and passed the title of the grantor. The same rule was held in *Livingston v. Proseus*, 2 Hill, 526.

It seems to us that the doctrine held in these cases is founded upon reason. If a person who is disseized conveys land, and the disseizor abandons the possession, and the grantee enters and occupies it, we are of opinion that he acquires an indefeasible title. He thus acquires an actual seizin under a title which his grantor is estopped by his deed to deny, and a stranger who subsequently disseizes him cannot set up the invalidity of his deed.

If the disseizor abandons his possession, and the grantee does not enter into actual occupation, but the land is vacant, we see no reason why the same result should not follow. Livery of seizin, necessary at common law, is not required under our laws. Delivery of the deed is delivery of seizin unless the land is adversely occupied at the time. If it is, and the disseizor abandons his possession, we think it inures to the benefit of the grantee, and gives him a seizin, so that he has a title which is valid against a stranger who subsequently disseizes him. This result is according to justice and the real rights of the parties, and it is no hardship upon any one to permit the grantee to bring the suit in his own name instead of resorting to the fiction of a suit by his grantor. It follows, therefore, in the case at bar, that the instructions asked for should have been given.

Exceptions sustained.

Gray v. Boston Gas-light Company.

GRAY v. BOSTON GAS-LIGHT COMPANY.

(114 Mass. 149.)

Nuisance — by act of others than owner of property — action by owner.

The owner of a building to the chimney of which a gas company has, without the owner's consent, so affixed a wire as to render the chimney unsafe, and ultimately to cause its fall upon a passer-by, may be liable for the damage so caused ; and if when so liable, he pays the damage, he has an action against the company for indemnity. (See note p. 328.)

TORT. The first count of the declaration was as follows : “ And the plaintiff says that the defendant forcibly entered a certain parcel of land of the plaintiff with a building thereon [describing it], and placed and fastened a telegraph wire upon a certain chimney of said building, and continued the said wire so placed and fastened for a long time, by means whereof the said chimney was pulled and thrown down and broken to pieces, and the roof of said building was broken and injured. And the plaintiff says that Josiah W. Brown and Harrison Chick were then owners of a certain horse, harness and wagon, which they were then driving along said Summer street, and by reason of the premises certain parts of said chimney so pulled and thrown down as aforesaid fell upon said horse, harness and wagon, and hurt and injured the same, so that the said horse afterward died of said injuries ; and thereupon the said Brown and Chick brought an action of tort in this court against the plaintiff for the recovery of damages for the injuries so sustained by them, of all which the defendant afterward had notice and was requested by the plaintiff to defend said action, which the defendant neglected and refused to do. And the plaintiff, by reason of the premises, was obliged to pay, and did pay to said Brown and Chick to satisfy them for their said damages and to settle and compromise said action, the sum of three hundred and thirty-five dollars, and necessarily incurred divers other expenses, costs and charges in and about said settlement and the making thereof.”

There was a second count, alleging that the defendant corporation “ placed and fastened ” upon the chimney “ a telegraph wire, and continued the same wire so placed and fastened for a long time, and the defendant so negligently and improperly conducted itself in and about the placing, fastening and continuing of the said wire,” “ that by reason of

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the negligence and improper conduct of the defendant in that behalf," the chimney was thrown down, etc., as in the first count.

At the trial in the Superior Court, before PUTNAM, J., it appeared that the plaintiff owned a building on the corner of Summer and Washington streets in Boston; that the defendant corporation, without his permission, placed a telegraph wire on the chimney of the building, and that December 5, 1871, the chimney was either blown down, or pulled down by the wire, in a heavy gale of wind; that when the chimney fell, it caused some damage to the roof of the building, and injured a horse and a wagon, belonging to Brown and Chick, which were then being driven along Summer street; that Brown and Chick thereupon made a claim on the plaintiff, and subsequently brought a suit against him for the injury to the horse and the wagon; but that before the entry of the action a settlement was made by the parties; that the plaintiff, before making the settlement, gave written notice of the suit to the defendant, in which he alleged that the damage was caused by the defendant's wire pulling over the chimney, and stated that he should look to the indemnity, and requested the corporation to defend the suit; that the defendant in answer declined to defend the suit, or to advise as to its settlement; that the plaintiff then made the above compromise, and commenced this action; that the sum paid to Brown and Chick in settlement was \$335; that the plaintiff also paid \$50 for counsel fees incurred in making the settlement; and that the damage to the building was \$97. There was no evidence that Brown and Chick alleged that the fall of the chimney was due in any degree to the fact that the defendant's telegraph wire was placed upon it.

The defendant objected to the admission of all evidence relating to the injury sustained by Brown and Chick, and to their suit, and asked the court to rule that the plaintiff could not recover for the amount paid them in settlement, or for his legal expenses; and further requested the court to instruct the jury, that if the chimney was old, unsafe and dangerous, and if the injury to Brown and Chick was occasioned partly thereby and partly by reason of the defendant's telegraph wire being attached to the chimney, and if Brown and Chick brought their suit against the plaintiff alone, and the plaintiff settled it, he could not recover from the defendant the whole or any part of the amount paid in settlement.

The court declined so to rule, but instructed the jury "that whatever the previous condition of the chimney was, if the wire "pulled it down," that is, if they found that the chimney came down by reason of the strain of the wire upon it,—that is, that it would not have come down on that occasion, had it not been for the strain of the wire upon it,—the plaintiff

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would be entitled to recover the expenses of putting his building into the same condition as it was before; and further instructed them, for the purposes of the trial, and in order that the jury might settle all the questions of fact in this trial, that the plaintiff would be entitled to recover the amount he paid to Brown and Chick, with the expenses attending that suit, provided the jury found that the compromise was *bona fide*, and was a reasonably proper thing for the plaintiff to make, and the sum paid Brown and Chick was a reasonably proper sum."

The jury found for the plaintiff for \$482 damages, and also, in answer to a question of the court, found specially that the wire did "pull down the chimney."

The defendant alleged exceptions.

R. M. Morse, Jr., & C. P. Greenough, for defendant.

J. C. Gray, Jr., & J. L. Thorndike, for plaintiff.

ENDICOTT, J.* The defendant, without the permission of the plaintiff, attached to the plaintiff's chimney a telegraph wire. In a gale of wind, some time afterward, the chimney was blown down, and fell into the street, injuring a horse and a wagon then passing which belonged to Brown and Chick. They brought an action against the plaintiff as owner of the building, for the injury caused by the defective condition of the chimney. The plaintiff gave notice of the suit to the defendant, stating that the injury was caused by the wire pulling down the chimney, and that he should look to the company for indemnity, and requested it to come in and defend the action. The defendant declined to defend, or to advise a settlement. The plaintiff settled the suit with Brown and Chick and brought this action to recover the sum so paid, the legal expenses thereby incurred, and the damage done to the plaintiff's building by the fall of the chimney. The jury have found that the telegraph wire pulled down the chimney. The defendant admits its liability to pay for the sum paid Brown and Chick, or for the expenses of the plaintiff.

The first position taken by the defendant is, that the plaintiff was not liable in the action brought by Brown and Chick, because the owner of a building is not answerable for acts of negligence or wrong-doing committed on his land or building by a stranger.

It is undoubtedly true that when a stranger does a negligent or unlawful act on the land or building of another, and in doing that act occasions injury to a third party, the owner of the land or building is not liable.

* GRAY, C. J., did not sit in this case.

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Such a case would have been presented if the injury had been caused by the fall of the chimney while the defendant, without the knowledge or permission of the plaintiff, was putting the wire upon the chimney. The injury so resulting would have arisen, not from the unsafe condition of the chimney as part of the building, but from a negligent act committed without permission, and not under the authority of the owner. But the facts show a very different state of things. The wrongful act of the defendant caused the chimney, which was adjacent to the highway, to become unsafe and liable to fall by reason of the strain of the wire, and this condition was continued for a considerable period, and existed at the time of the injury. The owner of a building, under his control and in his occupation, is bound, as between himself and the public, to keep it in such proper and safe condition, that travelers on the highway shall not suffer injury. *Milford v. Holbrook*, 9 Allen, 17; *Shipley v. Fifty Associates*, 101 Mass. 251; S. C., 3 Am. Rep. 346 and cases cited; *Hadley v. Taylor*, L. R., 1 C. P. 53; *Kearney v. London, Brighton, &c., Railway Co.*, L. R., 6 Q. B. 759; *Welfare v. London & Brighton Railway Co.*, L. R., 4 Q. B. 693. It is the duty of the owner to guard against the danger to which the public is thus exposed, and he is liable for the consequences of having neglected to do so, whether the unsafe condition was caused by himself or another. *Coupland v. Hardingham*, 3 Camp. 398. Nor can the owner protect himself from liability, because he did not in fact know that the building was unsafe; he is bound to exercise the proper care required under the circumstances of the case. The liability of the plaintiff, therefore, to Brown and Chick did not depend upon, and was not based upon, the particular act of the defendant, but upon the determination of the question, whether the chimney was unsafe and dangerous to travelers under such circumstances that the owner was responsible for the injury suffered. It cannot be said, as matter of law, upon these facts, that the plaintiff was not liable to Brown and Chick, and that he could have successfully defended the action.

The second objection taken by the defendant is that the injury was caused by the negligence of the plaintiff and defendant; that they were joint tortfeasors, and that there cannot be indemnity or contribution between them.

When two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable, or *participes criminis*, and the damage results from their joint offense. This rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to

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liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such case the parties are not *in par. delicto* as to each other, though as to third persons either may be held liable. The numerous cases in our own reports are analogous, where towns, having been held liable for an unsafe condition of the highway, have recovered from the persons whose acts caused the unsafe condition. The reasons given in these cases are conclusive on this point. In *Lowell v. Boston & Lowell Railroad Co.*, 23 Pick. 24, the authorities were fully considered, and upon general principles it was held the town could recover, the parties not being *in pari delicto*. No distinction is there made, that the liability is cast upon the town by statute and not by the common law, and no such distinction is noticed in any of the cases which follow it. *Lowell v. Short*, 4 Cush. 275; *Swansey v. Chace*, 16 Gray, 303; *Milford v. Holbrook*, 9 Allen, 17; *West Boylston v. Mason*, 102 Mass. 341. In the last case, it was said the only fault of the town was the failure to remedy a nuisance which the defendant had created. Nor can there be any such distinction in principle. The ground of the action is that the defendant has, by his own unauthorized act, exposed the plaintiff to a liability, and it is immaterial whether the liability is imposed by force of a statute or by the rules of the common law. In either case the plaintiff is held liable by inference of law, and not by reason of his active participation in the act which was the occasion of the injury. *Pearson v. Skelton*, 1 M. & W. 504. See also *Chicago City v. Robbins*, 2 Black, 418; *Bailey v. Bussing*, 28 Conn. 455. We are therefore of opinion that the defendant is responsible over to the plaintiff in this action, the jury having found that the wrongful act of the defendant caused the unsafe condition of the building, and exposed the plaintiff to the liability.

The plaintiff gave notice to the defendant of the action brought by Brown and Chick, and the defendant refused to come in and defend; the jury have found that the sum paid in settlement was reasonable, and that the plaintiff acted prudently in paying it; and he is entitled to recover that sum and his expenses, together with the damages to his building. No question was made by the defendant as to the items of the plaintiff's expenses. *Swansey v. Chace*, 16 Gray, 303; *Blanchard v. Equitable Safety Ins. Co.*, 12 Allen, 386; *Smith v. Compton*, 3 B. & Ad. 407; *Tindall v. Bell*, 11 M. & W. 228.

Exceptions overruled.

NOTE.—As to the liability of owners or tenants of premises for injuries occasioned by reason of their being unsafe, see 1 Wash. Real Prop. (4th ed.) 539; also *Swords v.*

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Edgar, 17 Am. Rep. 295; *Leonard v. Storer*, 15 id. 78; *Clancy v. Byrne*, id. 391; *Visher v. Thirkell*, 4 id. 422; *Gwinnell v. Hamer* (Eng. Com. Pleas), 15 Am. Rep. 398, note; *Mullen v. St. John*, id. 530.—REP.

BAILEY V. NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY.

(114 Mass. 177.)

Action — parties to action on insurance policy.

When the promise of the insurer in a policy is to the insured, his executors, administrators and assigns, to pay him, his executors, administrators or assigns, an action upon it cannot be maintained in the name of one for whose benefit it is expressed to be made. (See note p. 331.)

CONTRACT upon a policy of life insurance. Writ dated June 9, 1873. The declaration alleged that the defendants made a policy of insurance, a copy of which was annexed, for the sum of \$2,500, on the life of Joseph A. Bailey, Jr., for the term of his life, for the benefit of his widow. After the allegations of the death of the insured March 21, 1873, and notice and proof of the same to the defendants, the declaration concluded, "and the plaintiff is the widow of said deceased, and the defendants were bound to pay the amount of said loss to the plaintiff within sixty days after said notice." By the terms of the policy, which was dated June 28, 1860, the defendants, in consideration of the premium paid and to be paid annually "by Joseph A. Bailey, Jr.," "being the assured in this policy," "do insure the life of said Joseph A. Bailey, Jr., in the amount of \$2,500 for the term of his life." "And the said company do hereby promise to, and agree with the said assured, his executors, administrators and assigns, well and truly to pay the said sum insured to the said assured, his executors, administrators or assigns, sixty days after due notice and proof of the death of the said assured during the continuance and before the termination of this policy. For the benefit of his widow, if any."

In the Superior Court the case was submitted upon the following agreed statement of facts:

"The defendants admit all the facts necessary to enable the plaintiff to recover, except her right to maintain this action in her own name, and insist that no action can be brought upon said policy except in the name of the executor or administrator of Joseph A. Bailey, Jr., the

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insured. This question is submitted to the court, judgment to be entered for the plaintiff in the sum of \$2,500, with interest from May 29, A. D. 1873, or for the defendants, as the court shall determine upon the foregoing agreed statement."

Judgment was ordered for the defendants, and the plaintiff appealed to this court.

F. V. Balch, for plaintiff.

D. Foster, for defendants.

ENDICOTT, J. We think the question raised in this case has been settled by the recent decisions of this court. In *Burroughs v. State Assurance Co.*, 97 Mass. 359, it was held, on a policy payable upon the death of the assured to his executors, administrators or assigns, for the use of the wife and children of the assured, that an assignee of the same could maintain the action, although in fact it was defended by the guardian of an infant child of the assured, the wife being dead. If the assured had left no wife or child, the assignee, upon recovery, would have received the whole amount to his own use; as the assured left a child, the assignee would hold the amount recovered subject to the equitable rights of the child, which could not be determined in that suit, but might be, if necessary, in a suit brought afterward by the child against the assignee. In *Gould v. Emerson*, 99 Mass. 154, such a suit was brought by a child against an administrator who had received the amount due upon a similar policy, and judgment was for the plaintiff, on the ground that the same having been properly paid to the administrator, he held it as trustee, that the plaintiff did not claim as creditor, legatee or distributee, but as *cestui que trust* of money in regard to which the trustee had no duty but immediate payment.

The principle upon which these decisions rest is, that in policies of this kind the executor, administrator or assignee becomes a trustee under an express trust, and the legal title being in him, he can maintain an action in his own name against the company. It therefore necessarily follows that the *cestuis que trust* cannot maintain such action, but must have their rights determined between themselves and the trustee in other forms of proceeding. This brings this class of trusts within the general rules governing all trusts, and renders the practice simple and uniform. To allow *cestuis que trust* to maintain actions in their own names might subject insurers to several suits on the same policy, or call upon them to determine who has the beneficial interest, or force them to

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resort to a bill of interpleader to ascertain the equitable rights of the parties.

In *Campbell v. New England Insurance Co.*, 98 Mass. 381, a suit was brought, as in the case at bar, by a wife who had the entire equitable interest, but the objection that she could not maintain the action was not taken till the case was on trial for the third time. The court held that the defendants, by their previous conduct of the case, had waived the right to avail themselves of this objection, but intimated that if valid, and seasonably taken, it would have rendered the other ground of defense immaterial. See also *Exchange Bank v. Rice*, 107 Mass. 37; S. C., 9 Am. Rep. 1.

We think the objection valid, in this case seasonably taken, and there must be

Judgment for the defendants.

NOTE.—In *Davenport v. Mutual Life Ins. Co.*, 47 Vt. 528, in assumpsit on a policy of life insurance by the administrator of the insured, the declaration alleged a consideration moving from the insured, and a promise to pay the wife and children of the insured, or their legal representatives. Held, on demurrer, that the action could not be maintained in the name of the administrator.

The court said, POWERS, J., delivering the opinion: "The questions in this case arise upon a demurrer to the plaintiff's declaration. It is insisted first, that the plaintiff cannot maintain this suit as the administrator of Trombley, but that the suit should be brought in the name of the wife and children of Trombley. The general rule in actions on contracts is, that the suit should be brought by the party having the legal interest in the contract — the person to whom the promise and undertaking run. *Hall v. Huntoon*, 17 Vt. 244; *Corey v. Powers*, 18 id. 587. The averment in the declaration is, that the defendant 'undertook and then and there faithfully promised to pay to the wife and children, or their legal representatives,' etc. As this declaration stands, the right of action is clearly in the wife and children. When the sufficiency of pleadings is challenged by demurrer, inferences are to be drawn against, rather than in favor of the pleader; and in this case, a promise to the intestate can, at least, only be inferred — it is not alleged. The case of *Fugure v. Mutual Society of St. Joseph*, 46 Vt. 362, did not turn upon a question of pleading. In that case, it was held that the plaintiff could not recover because there was nothing due him. An examination of that case will show that the declaration counted upon a promise, not to the plaintiff, but to the deceased husband. There is, obviously, no conflict between the doctrines of that case and the one at bar. The view we have taken of the question renders it unnecessary to consider the other questions raised."

In *Hogle v. Guardian Life Ins. Co.*, 4 Abb. Pr. (N. S.) 346; S. C., 6 Rob. 567, W. procured insurance on his life by a policy, expressing on its face to be for the plaintiff's benefit; by which the company agreed "to pay the assured, his executors, etc.," the sum assured. The New York Superior Court, at General Term, held that the term "assured" was intended to designate the person for whose benefit the insurance was effected, and that the action was well brought by the plaintiff.

In *Myers v. Keystone Mut. Life Ins. Co.*, 27 Penn. St. 268, it was held in an action on a policy on the life of the husband for the use of the wife, that she could maintain the action notwithstanding there was an executor. So in *McComas v. Covenant Mut. Life*

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Ins. Co., 56 Mo. 573, the policy agreed to pay the husband, his executors, administrators or assigns, but the consideration was expressed as paid for the use and benefit of the wife. It was held that a suit by the wife was well brought.

In a policy on the life of the husband for the benefit of the wife, was this stipulation, "In case of the death of the wife before the decease of the husband, the sum insured shall be payable to their children or to their guardian, if under age." *Held*, that the action was well brought to the name of a guardian *ad litem*.

In *Ruppert v. Union Mut. Life Ins. Co.*, 7 Rob. 155, the policy was "for the sole and separate use of his three children named, to be paid to the said assured, their administrators," etc. The insured afterward devised the policy to his executors in trust for certain different purposes. It was *held*, that the executors could not maintain the action, for the children were entitled to the fund in question.

In *Flynn v. North American Life Ins. Co.*, 115 Mass. 449, it was *held*, that an action on a policy under seal, whereby the insurer covenanted with A., his heirs, executors, etc., to pay the sum insured to B. on the death of A., cannot be maintained by B.—*REP.*

CURTIS V. ASPINWALL.

(114 Mass. 187.)

Auction sale — employment of "puffers" — terms of sale — title — damages.

By-bidding or puffing at an auction sale, advertised "to be positive," of land in lots, will render the sale voidable by a purchaser influenced by such bidding, whether that bidding was upon the lot purchased by him or upon lots previously offered, even though such bidding was instigated by the auctioneer without the seller's knowledge; but if it appears that he was not so influenced the sale is valid.

and, that, without the owner's knowledge, was under attachment, was sold by auction, ten days being "allowed to examine the title, within which time the property must be settled for at the office of the auctioneer." The attachment was not discharged within the ten days, but within that time the purchaser had written to the auctioneer, declining "to proceed further in the matter," as he considered "the whole proceeding invalid." In an action against the purchaser for a refusal to complete the contract, *held*, that, as the vendor was bound to give a good title only upon compliance with the terms of the sale within ten days, the purchaser's letter was a waiver of his right to object to the attachment as an incumbrance.

and was sold by auction, a sum of money to be paid "on the spot, which will be forfeited to the seller if the terms and conditions are not complied with, but the forfeiture of said money does not release the purchaser from the obligation to take the property." In an action against the purchaser for not taking the property, *held*, that the money paid at the sale should be considered by the jury in reduction of damages.

ACTIONS of contract tried together. The plaintiff in the first action sought to recover damages of the defendant for the non-

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performance of an agreement to complete the purchase of certain lots of land bid off by him at an auction sale. The plaintiff in the second action, being the defendant in the first action, sought to recover back the money paid by him as a deposit at the sale.

At the trial in the Superior Court, before PITMAN, J., it appeared that June 6, 1871, Curtis being the owner of land in Brookline, to which he had acquired title March 31, 1868, divided it into eighteen lots, and caused them to be offered for sale by auction by A. R. Walker & Co., auctioneers. Aspinwall was present, and the other lots having been bid off by other persons present, he bid off the remaining five lots, and signed on the spot an agreement with the auctioneers to take and pay for them according to the terms of sale, and paid down the sum of \$125.

The material portion of those terms was as follows :

“ Three-quarters of the purchase-money may remain as a power of sale mortgage for three years, at 7 per cent. interest per annum, payable semi-annually, or the whole or any greater part may be paid on the delivery of the deed. Ten days will be allowed to examine the title, within which time the property must be settled for at the office of the auctioneer, No. 48 Winter street, Boston. One hundred dollars on the house, and twenty-five dollars on each lot will be required of the purchasers on the spot, which will be forfeited to the seller if the terms and conditions are not complied with ; but the forfeiture of said money does not release the purchaser from his obligation to take the property. The value of the insurance policies now on the property must be paid by the purchaser of the houses. Taxes for the present year are to be paid by Mr. Curtis. The property is now mortgaged for about \$2,500, which may remain if the estate is purchased as a whole. Lot No. 1, with the buildings thereon, will be offered first, giving the purchaser the privilege of the remaining lots at three cents per foot ; should the purchaser elect to take no more land at the price given, it will then be offered, giving the highest bidder his choice of one or more lots ; and all lots that are sold will be released as soon as when desired.”

Attached to the agreement and terms of sale was the following extract from the advertisement :

“ The owner of the above property, Mr. C. D. Curtis, having made his arrangements to settle permanently in California, the sale will be positive.”

On January 17, 1871, all Curtis's real estate had been attached on *mesne* process, without his knowledge at the time, in an action against him for a debt of upwards of \$3,000 due from him to the

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Brighton National Bank; and the attachment remained in force till after the bringing of the present actions.

No disclosure of the existence of the attachment was made in any advertisement of the sale, or to the company present, or to the purchasers at the time of sale. Curtis testified at the trial that he had no actual knowledge or information of the attachment until after the expiration of the ten days allowed by the terms and conditions of sale to purchasers to examine the title.

Aspinwall received from the auctioneers the following letters:

"Boston, June, 13, 1871. Wm. Aspinwall, Esq.: Dear Sir,—Please advise us by return mail if you wish three-quarters of the purchase-money to remain on mortgage, as per terms of sale. Yours, &c., A. R. Walker & Co."

"Boston, June 15, 1871. Wm. Aspinwall, Esq.: Dear Sir,—I am uncertain if I wrote to you, asking if you would like to pay all cash. Please advise me, and excuse second letter, should this prove to be. Yours, &c., A. R. Walker & Co."

To these letters Aspinwall replied as follows:

"42 and 44 Court Street, June 16, 1871. Messrs. A. R. Walker & Co.: Gentlemen,—Your notes to Mr. Aspinwall came to his hand last week and this morning. We are instructed by Mr. Aspinwall to say he shall decline to proceed further in the matter referred to, as he considers the whole proceeding invalid. Respectfully your obedient servants, Hodges & Barrett, Att'ys for W. Aspinwall. P. S.—Will you please accept notice that Mr. A. will expect a return of the moneys paid by him."

Aspinwall, in support of a ground of defense set up in his answer to the effect that Curtis employed by-bidders and caused fictitious bids to be made at the sale, and particularly at the sale of the lots struck off to him, of which he had no knowledge at the time, and by which he was deceived and induced to bid, offered evidence tending to show such by-bidding, or fictitious bids, upon other of the lots embraced in the sale than those bid off by him. There was no evidence offered of by bidding on the lots struck off to him, and the judge excluded the evidence offered as incompetent.

The counsel for Aspinwall requested the court to rule:

"That upon the foregoing facts and evidence, the plaintiff in the first action had no legal ground of action against him, and that, as plaintiff in

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the second action, he was entitled to recover back the money paid down by him at the sale.

“That the agreement was by its terms or by the construction the law puts upon its terms, for an unincumbered title. That it required Curtis to exhibit on record, or to have such title, with the exception of the mortgage, disclosed, at all times during, or at least at some time within, the period allowed by the agreement for the examination of the title.

“That the existence of the attachment, undisclosed by Curtis, entitled Aspinwall to treat the sale as invalid and not binding on him.

“That the case presented was not one of mutual agreement, to be performed simultaneously, but one where Curtis's agreement in respect to title was to be made good before Aspinwall was required to take any step toward performance.

“That the letter of June 16, 1871, was immaterial, being only notice that Aspinwall declined to do what he was not bound to do.”

The presiding judge declined to rule as above requested, but for purposes of the trial ruled adversely to the defendant in the first action, and to the plaintiff in the second, upon all the points embraced in the requests.

The presiding judge, among other instructions not objected to, instructed the jury that if they were satisfied that during the ten days allowed by the terms and conditions of sale to examine the title, Curtis, having the present ability to do so, was ready and willing to comply with all his obligations under the agreement, and to discharge all incumbrances, and but for the letter of June 16, 1871, the defendant might have had a clear title upon demand, then Curtis was entitled to recover in both actions.

The judge also instructed the jury that the \$125 paid down at the sale was to be regarded (in case they found for Curtis) as a forfeit, and not as such a credit as would reduce his damages in the first action.

The jury found a verdict for Curtis in both actions.

Aspinwall filed a motion for a new trial, alleging among other grounds that the verdict was against evidence, and that even under the instructions of the court it was clear as matter of law, that, in view of the admitted ignorance of the plaintiff of the existence of the attachment, he could not have been ready and willing to discharge it. But the court, for the purpose of presenting all the questions of law to the Supreme Judicial Court, held otherwise, and overruled the motion, and Aspinwall alleged exceptions.

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E. F. Hodges & J. F. Barrett, for Aspinwall.*J. Nickerson*, for Curtis.

MORTON, J. There is some diversity in the decisions, as to the circumstances under which by-bidding will invalidate a sale at auction. But it is clear, both upon principle and the weight of the authorities, that when the sale is advertised or stated to be without reserve, the secret employment by the seller of puffers or by-bidders renders the sale voidable by the buyer. *Phippen v. Stickney*, 3 Metc. 384, and cases cited; *Towle v. Leavitt*, 3 Foster, 360; *Veazie v. Williams*, 8 How. 134; *Thornett v. Haines*, 15 M. & W. 367.

The offer of property at auction without reserve is an implied guaranty that it is to be sold to the highest bidder, and each bidder has the right to assume that all previous bids are genuine. The seller in substance so assures him, and the secret employment by the seller of an agent to make fictitious bids is equivalent to a false representation by him, as to a matter in which he is bound to speak the truth, and act in good faith. The real bidder is deceived, and the price is enhanced, by artifice and false pretenses. In the case at bar the seller stated in his advertisement that "the sale will be positive." This is equivalent to stating that it would be without reserve, and we think that the evidence offered by the buyer of by-bidding at the auction sale should have been admitted. Though his offer was to show by-bidding upon the other lots embraced in the sale, and not upon the lots bid off by him, the principle is the same. The sale was of a large piece of land cut up into small lots. The sales of all the lots were on the same day, and were parts of the same transaction. Any artifice or fraud used to deceive the bidders, and to enhance the price of the lots first sold, would tend to fix the apparent value of all the lots, and to mislead the judgment of the real bidders upon the lots afterward sold. As the purchase by the buyer in this case was of the last lots sold, it was competent for him to show that the seller secretly procured fictitious bids to be made upon the lots previously sold, and that he was deceived and misled thereby. There must, therefore, be a new trial in both the suits. If the buyer succeeds in proving his allegation of the seller's fraud by employing by-bidders, the seller cannot maintain his action against him, and he is entitled to recover back the deposit paid to the auctioneer. *Thornett v. Haines, ubi supra*.

Another question is presented by this bill of exceptions which it is proper to consider, as it will arise upon another trial.

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It appears that at the time of the sale there was an attachment upon the land sold, in a suit against Curtis, which was not discharged until after Curtis's suit was brought. It was not known to Curtis until after the ten days named in the conditions of sale had elapsed. It does not appear whether it was known to Aspinwall or not. It is contended that this defeats Curtis's right to maintain his action.

By the fair construction of the contract Curtis was required to convey to the purchaser the land with an unincumbered title. The provision that the purchaser was to have ten days to examine the title, implies that he was not bound to take it unless he could have a good title. *Richmond v. Gray*, 3 Allen, 25 ; *Packard v. Usher*, 7 Gray, 529 ; *Mead v. Fox*, 6 Cush. 199.

But the contract does not stipulate that the land was free from incumbrance at the time of the sale, and all that Curtis was required to do was to give the purchaser a good title upon his complying with the terms of the sale within ten days. Instead of offering to perform his contract, Aspinwall, on the 16th of June, wrote a letter to the auctioneer declining to perform it, on the ground that "he considers the whole proceeding invalid." We think this was a waiver of his right to object that there was an incumbrance upon the land. It was an absolute refusal to perform on other grounds, and excused Curtis from tendering a deed or discharging the incumbrances so as to be in a condition to convey a good title. *Carpenter v. Holcomb*, 105 Mass. 280.

The attachment was an incumbrance, which the examination of the title would disclose, and which Curtis could have discharged, if he had notice that an objection was made on that account. Aspinwall, having broken his contract by an absolute refusal to perform on the ground that the sale was void on account of by-bidding or for some other reasons, cannot now defend on the ground of an incumbrance subsequently discovered, but must be held to have waived any objections which it was in the power of Curtis to remedy. *Brewer v. Winchester*, 2 Allen, 389 ; *Howland v. Leach*, 11 Pick. 151.

We are of opinion, therefore, that the ruling of the presiding judge that Curtis was entitled to recover if the jury were satisfied that he had the present ability and was ready and willing to discharge all incumbrances, and that but for the said letter of June 16, Aspinwall might have had a clear title on demand, was sufficiently favorable to Aspinwall.

We are also of opinion that the ruling on the question of damages was erroneous. Curtis, if he prevails, is entitled to recover compensation for all the loss he has sustained by reason of the refusal by the defendant to

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perform the contract. The one hundred and twenty-five dollars paid by the defendant as a deposit should be considered by the jury in reduction of damages, because its necessary effect is to reduce the loss sustained by Curtis.

Exceptions sustained.

A new trial was had in the Superior Court, before ALLEN, J., when Aspinwall introduced evidence that when the lots bid off by him were offered for sale, Curtis secretly procured an agent to bid, as a by-bidder, against him; that such agent did bid several times without his knowledge at the time, in consequence of which he, Aspinwall, increased his bids higher than he would otherwise have done, and that the lots were struck off to him at the highest price he thus bid.

He also introduced evidence that some of the other lots previously offered for sale were struck off in the name of a fictitious person by the auctioneer, who procured a friend to personate such fictitious person and to sign a fictitious name to the contract of sale, for the benefit of Curtis, and that the sale of these lots was not a real but a fictitious sale, and that this was made known to Curtis by the auctioneer immediately after the sale.

Curtis introduced evidence to disprove all this testimony on every point.

Aspinwall testified that he witnessed the entire sale; that he had no suspicion even, at the time, that any of the bids or sales were not genuine, and on his cross-examination testified, "I should not have made a bid had I not supposed it was a good speculation. I did not at the time think of any thing being dishonest about it. I thought it was a good purchase at the time."

Curtis asked the court to rule "that Aspinwall must show that Curtis was a party to the fraud, if any is proved, and that he, Aspinwall, suffered by reason of the fraud; that if Walker acted fraudulently without the knowledge or consent of Curtis, Curtis would not be liable for his, Walker's, acts; that if Aspinwall shows a by-bidding upon any of the lots, he must prove that his bids were placed on them, or were influenced by them, and that he suffered by them."

But the judge declined so to rule, and ruled that it was not necessary to prove that Curtis knew of any fraud or by-bidding; that the acts of the auctioneer must be taken and considered as the acts of Curtis, even if Curtis was entirely ignorant of any such by-bidding or fraud on the part of the auctioneer; that any by-bidding on the lots previously sold, where the sale was advertised to be positive, though there was none on

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the lots bought by Aspinwall, would be sufficient to invalidate the sale; that if the jury find there was by-bidding on any of the lots, either those previously offered for sale or those bid off by Aspinwall, it was not necessary for them to inquire whether the bids of Aspinwall were influenced by such bids or not.

The jury returned a verdict for Aspinwall in both cases, and Curtis alleged exceptions, which were argued in November, 1875, by the same counsel.

MORTON, J. The verdict of the jury establishes the fact that at the auction sale there was secret by-bidding procured either by Curtis or by the auctioneer employed by him. An auctioneer is the agent of the person who employs him to sell. From the nature of his business he is the agent of the buyer for the single purpose of binding him by a memorandum in writing to satisfy the statute of frauds, but in all other respects he is the agent of the seller. If while acting in the business of his principal he commits a fraud, of which the principal has the benefit, the latter is responsible for it. He cannot insist upon the benefit of a sale and repudiate the fraudulent acts of his agent which were a part of it. *Fogg v. Griffin*, 2 Allen, 1; *Veazie v. Williams*, 8 How. 134. It follows that the ruling of the court, that it was not necessary to prove that Curtis knew of any by-bidding, but that the acts of the auctioneer must be regarded as the acts of Curtis, was correct.

At the last trial there was evidence tending to show by-bidding, both upon the lots bid off by Aspinwall, and upon lots previously sold; and Curtis asked the court to rule "that if Aspinwall shows a by-bidding upon any of the lots, he must prove that his bids were based on them, or were influenced by them, and that he, Aspinwall, suffered by them." The court refused this ruling, and instructed the jury that if they found "there was by-bidding on any of the lots, either those previously offered for sale, or those bid off by Aspinwall, it was not necessary for them to inquire whether the bids of Aspinwall were influenced by such bids or not."

This presents a question which was not raised at the former hearing of this case. The only point then adjudicated upon this part of the case was that evidence, offered by Aspinwall, that Curtis employed puffers or by-bidders in the sale of the lots previously offered for sale was admissible. The conclusion of the court upon this question is stated to be, that "it was competent for him to show that the seller secretly procured fictitious bids to be made upon the lots previously sold, and that he was deceived and misled thereby."

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The ground upon which by-bidding at an auction is held to avoid the sale, is that it is a fraud upon the purchaser. Strictly speaking, in all cases where fraud is alleged as a cause of action, or as a defense, as for instance in an action of deceit, the burden of proof is upon the party alleging it, to prove the fault and that he was influenced or damaged by it. But if the fraud proved is practiced for the purpose of misleading, and such is its natural effect, the presumption is that it does mislead, and the party may rest upon this presumption as sustaining such burden of proof, in the absence of evidence to rebut it. *Holbrook v. Burt*, 22 Pick. 546; *Collins v. Denison*, 12 Metc. 549; *Watson v. Earl Charlemont*, 12 Q. B. 856.

In cases where secret by-bidding is practiced at an auction, the presumption that real bidders upon the same property are influenced and misled by it is very strong, if not conclusive. The purchaser's bid is based upon the assumption that the preceding bids are real and would not have been made if no fictitious bids had preceded it. The fraud of the seller is directly and inseparably connected with the contract of the purchaser, being, in its nature, an inducement to that contract. Ordinarily such by-bidding not only naturally but necessarily influences and misleads the real bidder.

And where, as in the case at bar, a large tract of land is cut up into lots, and sales of the lots are made at the same time, as parts of the same transactions, we think the same rule applies. The designed and natural effect of by-bidding upon the lots first sold is to mislead the judgment of the buyers as to the value of the whole tract, and to induce them to bid more than they would upon a fair sale. There is a presumption that the last bidders are influenced and injured by the previous fictitious bids, and they may avoid the sale without further proof that they are influenced and injured, if there is no evidence tending to control or rebut such presumption.

But this presumption may be rebutted. If the by-bidding had no effect or influence upon the purchaser's bid, the latter cannot avoid his contract. As in other cases where deceit or fraud is used in a sale, the purchaser cannot avoid it if he was not induced or influenced by the fraud to enter into the contract.

The ruling of the learned judge who presided at the trial went further than this. He instructed the jury that any by-bidding on any of the lots avoided the sale, and that they were not to inquire whether the bids of Aspinwall were influenced by such by-bids or not. This required them to find a verdict for Aspinwall, if there was any by-bidding, even if the evidence satisfied them that his bid was in no way induced or influenced

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by the fraud. In this respect the instruction was erroneous. As the evidence is not reported we cannot see that this error was immaterial, and are therefore of opinion that there must be a new trial.

Exception sustained.

CASE OF SUPERVISORS OF ELECTION.

(114 Mass. 247.)

Constitutional law — appointment of supervisors of election.

A statute directing the justices of this court to appoint supervisors of election is unconstitutional and void, because that duty is not a judicial function.

PETITION under Stat. 1873, ch. 376, § 1, for the appointment of supervisors of election. The petition was signed by five legal voters of Ward 3 in the city of Boston, and was in the following words :

“ To the Honorable the Justices of the Supreme Judicial Court, holden at Boston, within and for the county of Suffolk.

“ Respectfully represent the undersigned, being five legal voters of Ward Three in said city of Boston, that they desire to have the election of State and county officers, to be held in said ward on the fourth day of November next, guarded and scrutinized as provided in the 376th chapter of the acts of 1873, and they respectfully petition that supervisors of election may be appointed and commissioned in said ward, as provided in said act. And your petitioners will ever pray.”

This petition was presented on October 24, 1873, to the chief justice, by whose order notice was published in the *Boston Daily Advertiser* and *Boston Post*, to all persons interested in the matter thereof, or in a like petition in relation to any other ward, to appear before the Justices of the Supreme Judicial Court, at the court-house in Boston, on October 27, at two o'clock in the afternoon, that they might then and there show cause, if any they had, why the prayer of the petition should or should not be granted.

At the time appointed, the matter was argued by *L. M. Child*, for the petitioners, and by *P. A. Collins*, *contra*, before GRAY, C. J., WELLS, AMES, MORTON and ENDICOTT, JJ., and after a consultation of all the judges, their opinion was delivered on the same day by

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GRAY, C. J. This application is made under the Stat. of 1873, ch. 376. § 1, which provides as follows: "Whenever, prior to an election, five legal voters of any ward of a city shall make known in writing to a justice of the Supreme Judicial Court, in term time or vacation, their desire to have such election guarded and scrutinized, it shall be the duty of such justice, upon such notice as he shall deem meet, or without notice, prior to such election, to appoint and commission two legal voters of such ward, who shall be of different political parties, and shall be known and designated as supervisors of election. Before entering upon the duties of their office, the said supervisors shall be duly sworn to the faithful and impartial discharge of the same."

As the application appeared to involve a grave question of constitutional law, and a similar application might according to the terms of the statute be presented to a justice of this court at any time, the matter has been argued before five of the judges, and our brethren who could not attend at the argument have taken part in the consultation.

The intention of the Legislature is clearly expressed that supervisors of election should be appointed by the justices of this court. The question is whether the statute is constitutional.

The Constitution, being the fundamental law of the Commonwealth, established by the people, binds and controls all their servants, legislative, executive and judicial. Every person chosen or appointed to any office is expressly required, before entering upon the discharge of its duties, to take an oath to support the Constitution. And by the eighteenth article of the Declaration of Rights a frequent recurrence to the fundamental principles of the Constitution is declared to be absolutely necessary to preserve the advantages of liberty and to maintain a free government.

The Legislature is vested by the Constitution with full power and authority from time to time to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, "so as the same be not repugnant or contrary to this Constitution," as they shall judge to be for the good and welfare of this Commonwealth, and for the governing and ordering thereof, and of the subjects of the same. Every reasonable inference is to be drawn in favor of the validity of the acts of each branch of the government. But whenever application is made to the judiciary to carry into effect any statute in a particular case, and the statute in question appears to be clearly repugnant to the Constitution, it is the duty of the judges to obey the Constitution and disregard the statute.

The people of Massachusetts, warned by experience of the inconven-

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iences and dangers arising from the vesting of incompatible powers in the same persons under the royal government while this State was an English province, have made most careful provision for separating the three great departments of government, and for removing the judiciary, and especially this court, from political influences of every kind, as far as possible.

The final article of the Declaration of Rights declares that "in the government of this Commonwealth the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative or judicial powers, or either of them; the judicial shall never exercise the executive or legislative powers, or either of them; to the end it may be a government of laws and not of men." The Constitution further expressly prohibits the judges of this court to hold a seat in the House of Representatives, Senate or Council, or any other office or place under the authority of this Commonwealth, except that of justices of the peace through the State; and requires all commissions to be signed by the governor, and attested by the secretary or his deputy, and to have the great seal of the Commonwealth affixed thereto.

The justices of this court, as incidental to the large and varied judicial powers and jurisdiction conferred upon them by the Constitution and laws, embracing cases criminal and civil, in common law, equity, probate and divorce, may be and have been by many statutes authorized to appoint subordinate officers of various kinds to assist in the performance of their judicial duties, such as auditors, special masters in chancery, commissioners to take depositions in other States in cases pending here, commissioners to take bail, commissioners for the partition of lands, division of flats, or the setting off of dower, commissioners of sewers, or for the improvement of meadows and low lands, and commissioners to adjust the rights of transportation and modes of connection between connecting lines of railroad, or to assess the expenses, as between different counties, towns and other corporations, of maintaining roads or bridges. Parts of the duties performed by some of these officers in carrying out their functions are executive in their nature, and of a class which might be imposed by law upon strictly executive officers. But all the officers above enumerated, when appointed by the court, are by express requirement or necessary implication obliged to return a report of their doings to the court for its judicial action.

The judges may also be authorized by law, except so far as otherwise expressly provided by the Constitution, to appoint clerks of courts. But the duties of such clerks are in no sense executive; they are merely ministerial, and incident to the administration of justice. On like grounds,

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the courts are authorized, in the absence of the official prosecutor, to appoint a suitable person to perform his duties ; and to appoint all officers necessary to the transaction of their business.

The courts may also try the title to many offices by *mandamus*, *quo warranto*, or other proper process. But the title to an office is a right that has always been held to be a proper subject of judicial decision, except when the Constitution has committed it to other hands. Analogous to this is the power conferred on this court by statute to remove certain officers, and thus to declare a forfeiture of their rights and a determination of their offices.

The power of naturalization may perhaps be considered as one of the powers that may be intrusted by the Legislature in its discretion to one or another department of the government. Before the adoption of the federal Constitution, it was habitually exercised by the General Court of Massachusetts. Since the adoption of that Constitution, it has been vested by the Congress of the United States, with the assent of the State legislatures, in the judicial tribunals of the States, as well as in those of the nation. As it requires a final determination of all matters of law and fact involved in the admission of the applicant to citizenship, it may appropriately be made a subject of judicial investigation and decision.

The Stat. of 1873, ch. 376, §§ 2, 3, declares that it shall be the duty of the supervisors of election to attend the ward meetings ; to challenge the vote of any person whose qualifications they doubt ; to remain where the ballot-boxes are kept, from the opening of the polls until all the votes are cast, counted, canvassed and sealed up, and the certificates and returns made out ; to inspect and scrutinize the manner of voting and the method of keeping and marking the check list ; to count and canvass every ballot cast, and, in the event of a disagreement between their count and canvass and those of the ward officers, to make a return of their count and canvass to the mayor and aldermen.

These supervisors, although intrusted with a certain discretion in the performance of their duties, are strictly executive officers. They make no report or return to the court or to any judge thereof. Their duties relate to no judicial suit or proceeding, but solely to the exercise by the citizens of political rights and privileges.

We are unanimously of opinion that the power of appointing such officers cannot be conferred upon the justices of this court without violating the Constitution of the Commonwealth. We cannot exercise this power as judges, because it is not a judicial function ; nor as commissioners, because the Constitution does not allow us to hold any such office.

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The statute in question can find no support in the act of Congress of 1871, ch. 99, conferring power to appoint similar officers upon the judges of the Circuit Court of the United States, or in the action of those judges pursuant thereto; because the Constitution of the United States does not so explicitly restrain the judges from exercising executive or political functions as does the Constitution of this Commonwealth; and because the circuit judges acted individually and without opportunity of conference, and, so far as we are informed, without any question of constitutional power being raised or argued. *Petition denied.*

COMMONWEALTH V. CARR.

(114 Mass. 280.)

Indictment — misnomer.

When misnomer is pleaded in abatement to an indictment for a misdemeanor, and the fact, upon issue joined, is found against the defendant, he is not, as of right, entitled to plead over.

THE defendant, having been indicted in the Superior Court for a misdemeanor, pleaded in abatement that his name was Bartholomew Carr, and that he was not, and never had been known by the Christian name of Bartley. The Commonwealth replied that he was known as well by the name of Bartley as by the name of Bartholomew. Issue was joined, and the jury found that he was known as well by the name of Bartley Carr as by the name of Bartholomew Carr.

The defendant then moved for leave to plead not guilty. The court refused the motion, and the defendant alleged exceptions.

I. S. Morse, for defendant.

C. R. Train, Attorney-General, for Commonwealth.

GRAY, C. J. All the authorities agree that if one accused of misdemeanor pleads misnomer in abatement, and an issue of fact is joined thereon, and found against him by the jury, he cannot, as matter of right, plead over. 2 Hale's P. C. 255, 256; *Kinton v. Hopton*, Owen, 59; *S. C. nom. Kirton v. Williams*, Cro. Eliz. 495; *The King v. Gibson*, 8 East, 107; *Barge v. Commonwealth*, 3 Penn. 262, 264; *Guess v. State*, 1 Eng

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(Ark.) 147 ; If his plea in abatement is demurred to, and overruled in matter of law, it is otherwise. *Commonwealth v. Golding*, 14 Gray, 49. The rule in cases of misdemeanors is the same as in civil actions. *Young v. Gilles*, 113 Mass. 34. *Exceptions overruled.*

COMMONWEALTH v. NICHOLS.

(114 Mass. 285.)

Witness—right of accused when witness in his own behalf. Adultery—evidence of other acts.

When a person charged with the commission of a crime becomes a witness, under a statute providing that he may "at his own request, but not otherwise, be deemed a competent witness," and testifies that he did not commit it, he waives his constitutional privilege as to criminating himself, and may be cross-examined as to every thing relevant to the issue. (See note, p. 348.)

Upon the trial of an indictment for adultery, evidence of other acts of adultery committed by the same parties, near the time charged, though in another country, is admissible to support the indictment.

INDICTMENT alleging that the defendant, June 25, 1872, at Brighton, in the county of Middlesex, committed adultery with one Antoinette M. Morris.

At the trial in the Superior Court, before PITMAN, J., the defendant testified in his own behalf that he never had criminal intercourse with Antoinette M. Morris in Middlesex county. On cross-examination he was asked this question, "Did you within a few weeks either way have criminal intercourse with Miss Morris anywhere?" He declined to answer the question on the ground that it would tend to criminate him, but the court ruled that he must answer. He then declined to answer on the further ground that proceedings against him for adultery with the same person had been commenced in another county, and that, on that account, he was not bound to furnish evidence against himself; but the court ruled he must answer, and he answered, "I did."

The defendant requested the court to rule that the evidence of Antoinette M. Morris must be considered as that of an accomplice, and must be corroborated in some material particular which directly showed that the defendant committed the crime alleged. The court ruled that she was to be regarded as an accomplice, but that if the jury believed the defendant's answer that he had had criminal intercourse with her at about the time alleged in the indictment, although not in Middlesex county, that was a sufficient corroboration of her testimony in a material fact.

Commonwealth v. Nichols.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

G. A. Somerby, for defendant.

W. G. Coburn, Assistant Attorney-General (*C. R. Train*, Attorney-General, with him), for Commonwealth.

GRAY, C. J. By the common law, a witness cannot be obliged to criminate himself, and may therefore refuse to testify to any facts which will tend to prove him guilty of a crime. But his refusal must be made at the beginning of his examination upon the issue whether a crime has been committed by him. If he answers any questions upon that subject, he cannot afterward interpose his privilege, but is liable to be fully examined and cross-examined upon the matter. *Foster v. Pierce*, 11 Cush. 437; *Commonwealth v. Price*, 18 Gray, 472.

A party to the cause, who voluntarily offers himself as a witness, is entitled to no more, and in some respects to less, protection than a third person who testifies in obedience to a summons. A party taking the stand as a witness in his own behalf may be cross-examined in relation to a communication between himself and his counsel, as to which the latter would not be allowed to testify. *Woburn v. Henshaw*, 101 Mass. 193; S. C., 3 Am. Rep. 333. And a refusal to answer a question, on the ground that it might criminate him, is competent evidence against him, when it would not be against an ordinary witness. *Andrews v. Frye*, 104 Mass. 234. In *Norfolk v. Gaylord*, 28 Conn. 309, the defendant in a bastardy process having testified that he had had no criminal intercourse with the complainant for a period of several months, including the time when she had testified that the child was begotten, was held to be liable to be cross-examined as to such intercourse, although he claimed to be exempt from answering, on the ground that it took place at an earlier period, and, upon being compelled by the court to answer the questions, so testified.

The twelfth article of the Declaration of Rights, prefixed to the Constitution of the Commonwealth, declares that no subject shall be compelled to answer or furnish evidence against himself. The recent statutes allowing a person accused of crime to testify upon his trial (which he could not do at common law) provides, in order to secure this constitutional privilege, that he "shall, at his own request, but not otherwise, be deemed a competent witness," and that his neglect or refusal to testify

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shall not create any presumption against him. Stats. 1866, ch. 260 ; 1870, ch. 393, § 1, cl. 3. The object of these statutes is not to protect or assist criminals, but to promote the discovery of truth, so far as can be done without infringing the constitutional rights of the subject. If the accused chooses not to be a witness, he cannot be compelled to testify, and no inference prejudicial to him is to be drawn from his silence. *Commonwealth v. Harlow*, 110 Mass. 411. But if he puts himself on the stand as a witness in his own behalf, and testifies that he did not commit the crime imputed to him, he thereby waives his constitutional privilege, and renders himself liable to be cross-examined upon all facts relevant and material to that issue, and cannot refuse to testify to any facts which would be competent evidence in the case, if proved by other witnesses. *Commonwealth v. Lannan*, 13 Allen, 563; *Commonwealth v. Mullen*, 97 Mass. 545.

Acts of adultery between the defendant and the same woman, near the time of the adultery for which he was indicted in this case, though committed in another place, were competent to be proved in support of this indictment. *Thayer v. Thayer*, 101 Mass. 111. The bill of exceptions does not show that any objection was made to their admissibility because of remoteness in point of time, nor that the testimony of the defendant in relation to them did not corroborate the testimony of the woman upon a material point, nor even what her testimony was. The defendant has therefore no just ground of exception to the course of proceeding at the trial.

Exceptions overruled.

NOTE.—See *State v. Ober*, 13 Am. Rep. 88 ; S. C., 52 N. H. 459, and the note thereto.

The doctrine of the principal case was also held in *Commonwealth v. Morgan*, 107 Mass. 199; *McGarry v. People*, 2 Lans. 227. In the latter case the court said : " He (the defendant) was a volunteer witness under the provisions of Chap. 678 of the Laws of 1869. He was not only a volunteer, but had taken the necessary oath to enable himself to testify, 'to tell the truth, the whole truth and nothing but the truth' upon the whole issue of traverse between himself and the people. He could not have been compelled to give evidence at all ; but when he made himself a witness, under the privilege conferred upon him by this statute, he waived the constitutional protection in his favor and subjected himself to the peril of being examined as to any and every matter pertinent to the issue—any other construction would render this statute the most effectual shield to crime and criminals which could possibly be devised."

When upon the trial of an indictment a prisoner offers himself as a witness and testifies in his own behalf under the statute, he becomes subject to the same rules and is called upon to submit to the same tests that are legally applied to other witnesses. *Brandon v. People*, 42 N. Y. 265; *Fralich v. People*, 65 Barb. 48; *Commonwealth v. Bonner*, 97 Mass. 587.

In *Stover v. People*, 56 N. Y. 315 it was held that while under the New York statute the neglect or refusal of the defendant, upon the trial of an indictment, to testify will not create any presumption against him ; yet if he does become a witness he is made

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competent for all purposes in the case and if by his own testimony he can, if innocent, explain and rebut a fact tending to show his guilt and he fails so to do, the same presumption arises from his failure as would arise from a failure to give the explanation by another witness if in his power to give it.

Whether, where the statute does not prohibit any adverse inference from the fact that the prisoner does not take the stand, the failure raises a presumption against him, is not entirely settled. In *State v. Lawrence*, 57 Me. 574, it was held that when the defendant, in a criminal case, does not testify as a witness in his own behalf, it is not improper for the presiding judge, in his charge to the jury, to call their attention to the fact, and to instruct them, that it is a circumstance proper for their consideration. On this point the court (after remarking of a prior instruction that "the respondent is not in any legal sense, aggrieved by the instructions given or withheld upon this point") said: "So of the last instruction excepted to, if such it may be called. It would seem to be rather a suggestion of a fact already existing in the case, than a ruling in a matter of law. That the prisoner did not go upon the stand is a fact in the case, and is made no more or less so, simply because the presiding judge saw fit to call the attention of the jury to it.

It could hardly have escaped the notice of the jury if the judge had not alluded to it in his charge. It will exist in every case, so long as the act permitting parties to testify remains the law, unless the party himself chooses to make it otherwise. It will, too, have its legitimate effect upon the minds of the jurors, more or less convincing according to the circumstances of each case, whatever may be the ruling of the court in regard to it. Belief is controlled by principles more potent in their action than artificial rules of evidence. When a person has an opportunity to testify in relation to a matter of which he has knowledge, and in which he is deeply interested and refuses to do so, such refusal will have its weight, modified only by the accompanying circumstances. We act upon such testimony constantly. It is the instinct of our nature, and will not be eradicated by the ruling of any court. If this leads to injustice, the wrong is inherent in the law permitting parties to testify, and the remedy is with the legislature alone."

The statute of New York, heretofore cited in this note, provides that the neglect or refusal of any prisoner to testify in his trial "shall not create any presumption against him," and the Supreme Court held, in *Crandall v. People*, 2 Lans. 309, that it was error for the court upon the trial to permit, against the prisoner's objection, the counsel for the prosecution in addressing the jury, to comment on the omission of the defendant to offer his own testimony, as a circumstance against him or a fact to be considered in determining the case. So in *Ruloff's case*, 45 N. Y. 213, the Court said: "Neither the prosecuting officer nor the judge has the right to allude to the fact that a person has not availed himself of this statute, and it would be the duty of the Court, promptly to interrupt a prosecuting counsel who should so far forget himself, and the duties of his office, as to attempt to make use of the fact in any way to the prejudice of a person on trial." See also *People v. Tyler*, 36 Cal. 522; *Calkins v. State*, 18 Ohio St. 366.

A defendant putting himself upon the witness stand may be impeached like an ordinary witness. *Commonwealth v. Bonner*, 97 Mass. 686; *Brandon v. People*, 42 N. Y. 265. But the prosecution cannot impeach his general moral character. *Fletcher v. State*, 49 Ind. 126. So under a statute providing that a prisoner may "make a statement to the court or jury, and may be cross-examined upon any such statement," it was held that questions could not be put relating to matters outside of that statement, such as whether the prisoner had lived, or been in a number of places named, and whether at one time he had not been arrested on a charge of murder. *Gale v. People*, 26 Mich. 209; S. C., 1 Green's Crim. Law Rep. 211.

As to the policy of Statutes allowing witnesses to testify in their own behalf, see *Ruloff v. People*, 45 N. Y. 213.—REP.

Commonwealth v. Stratton.

COMMONWEALTH V. STRATTON.

(114 Mass. 303.)

Assault and battery — administering "love powder."

One is guilty of an assault and battery who delivers to another a thing to be eaten (e. g.), figs containing "love powders," knowing that it contains a foreign substance and concealing the fact, if the other, in ignorance of the fact, eats it and is injured in health. (See note, p. 352.)

INDICTMENTS, each charging that the defendant, upon a certain young woman, in the indictment named, made an assault and administered to her a large quantity of cantharides, "the same being" "a deleterious and destructive drug," with intent to injure her health, whereby she became sick and her life was despaired of. Both cases were tried together.

It appeared at the trial in the Superior Court, before DEVENS, J., that the defendant, in company with another young man, called upon the young women in the indictments named, and during the call offered them some figs, which they ate; they having no reason to suppose that the figs contained any foreign substance; that a few hours after, both young women were taken sick and suffered pain for some hours; that the defendant and his companion had put into the figs something they had procured by the name of "love powders," which was represented by the person of whom they got it to be perfectly harmless.

There was evidence that one of the ingredients of these powders was cantharides, and that this would tend to produce sickness like that which the young women suffered.

The court instructed the jury that if it was shown beyond a reasonable doubt "that the defendant delivered to the women a harmless article of food, as figs, to be eaten by them, he well knowing that a foreign substance or drug was contained therein, and concealing the fact, of which he knew the women to be ignorant, that such foreign substance or drug was contained therein, and the women eating thereof, by the invitation of the defendant, were injured in health by the deleterious character of the foreign substance or drug therein contained, the defendant should be found guilty of an assault upon them, and this, although he did not know the foreign substance or drug was deleterious to health, had been assured that it was not, and intended only to try its effect upon them, it having been procured by him under the name of a "love powder," and he being ignorant of its qualities or of the effects to be expected from it."

The jury found the defendant guilty of a simple assault in each case, and he alleged exceptions.

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W. Colburn, for defendant.

C. R. Train, Attorney-General, for Commonwealth.

WELLS, J. All the judges concur that the evidence introduced at the trial would warrant a conviction of assault and battery, or for a simple assault, which it includes. And in the opinion of a majority of the court, the instructions given required the jury to find all that was essential to constitute the offense of assault and battery.

The jury must have found a physical injury inflicted upon another person by a voluntary act of the defendant, directed toward her, which was without justification, and unlawful. Although the defendant was ignorant of the qualities of the drug he administered, and of the effects to be expected from it, and had been assured and believed that it was not deleterious to health, yet he knew it was not ordinary food, that the girl was deceived into taking it, and he intended that she should be induced to take it without her conscious consent, by the deceit which he practiced upon her. It is to be inferred from the statement of the case that he expected it would produce some effect. In the most favorable aspect of the facts for the defendant, he administered to the girl, without her consent and by deceit, a drug or "foreign substance," of the probable effect of which he was ignorant, with the express intent and purpose "to try the effect upon" her. This, in itself, was unlawful, and he must be held responsible for whatever effect it produced. Being an unlawful interference with the personal rights of another, calculated to result, and in fact resulting, in physical injury, the criminal intent is to be inferred from the nature of the act and its actual results. 3 Bl. Com. 120; *Rex v. Long*, 4 C. & P. 398, 407, note. The deceit, by means of which the girl was induced to take the drug, was a fraud upon her will, equivalent to force in overpowering it. *Commonwealth v. Burke*, 105 Mass. 376; S. C., 7 Am. Rep. 531; *Regina v. Lock*, 12 Cox's C. C. 244; *Regina v. Sinclair*, 13 id. 28.

Although force and violence are included in all definitions of assault, or assault and battery, yet, where there is physical injury to another person, it is sufficient that the cause is set in motion by the defendant, or that the person is subjected to its operation by means of any act or control which the defendant exerts. In 3 Chit. Crim. Law, 799, is a count at common law, for an assault with drugs. For other instances of assault and battery without actual violence directed against the person assaulted, see 1 Gabbett's Crim. Law, 82; Rosc. Crim. Ev. (8th ed.), 296; 3 Bl. Com. 120, and notes; 2 Greenl. Ev., § 84.

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If one should hand an explosive substance to another, and induce him to take it by misrepresenting or concealing its dangerous qualities, and the other, ignorant of its character, should receive it and cause it to explode in his pocket or hand, and should be injured by it, the offending party would be guilty of a battery, and that would necessarily include an assault; although he might not be guilty even of an assault, if the substance failed to explode or failed to cause any injury. It would be the same if it exploded in his mouth or stomach. If that which causes the injury is set in motion by the wrongful act of the defendant, it cannot be material whether it acts upon the person injured externally or internally, by mechanical or chemical force.

In *Regina v. Button*, 8 C. & P. 660, one who put Spanish flies into coffee to be drank by another, was convicted of an assault upon the person who took it, although it was done "only for a lark." This decision is said to have been overruled in England. *Regina v. Dilworth*, 2 Mood. & Rob. 531; *The Queen v. Walkden*, 1 Cox's C. C. 282; *Regina v. Hanson*, 2 C. & K. 912. In the view of the majority of the court, the last only of these three cases was a direct adjudication, and that entirely upon the authority of mere *dicta* in the other two, and without any satisfactory reasoning or statement of grounds; and the earlier decision in *Regina v. Button* is more consistent with general principles, and the better law.

Exceptions overruled.

NOTE.—Administering cantharides to a woman with intent to excite her sexual passion, in order to obtain connection with her, was held to be an administration with intent to injure, aggrieve or annoy within 23 Vict., c. 8, § 2. *Reg. v. Wilkins*, L. & C. 89; 9 Cox's C. C., 20, 31 L. J. M. C. 72. But administering cantharides to a woman without her knowledge, with intent to injure her health, was held to be neither indictable as an assault nor as a misdemeanor at common law. *Reg. v. Hanson*, 4 Cox's C. C. 138; 2 C. & K. 912.

In *Reg. v. Sinclair*, 13 Cox's C. C. 28; S. C., 11 Eng. Rep. 385, B. knowing that he had the gonorrhœa had connection with a girl without informing her of the fact, by means of which the disease was communicated to her, and it was held by Mr. Justice SHEA of the CENTRAL CRIMINAL COURT, on the strength of *Reg. v. Bennett*, 4 Fos. & Fin. 1105, that an indictment for inflicting actual bodily harm was proper.

In *Reg. v. Bennett*, decided by Mr. Justice WILLES in 1865, the prisoner had slept with his niece with her consent and communicated to her a syphilitic disorder, and he was held guilty of an assault.

Wharton says (2 Crim. L., § 1246), "It has been always regarded as permissible to charge the administering of poison as an assault; and the same reasoning applies to the malicious application of injurious drugs," citing *People v. Blake*, 1 Wheeler C. C. 490. —REP.

Commonwealth v. Foster.

COMMONWEALTH V. FOSTER.

(114 Mass. 311.)

Forgery — fraudulent intent — representing signature as that of another.

One, who with intent fraudulently to utter a promissory note as the note of a person other than the signer, procures to it the signature of an innocent party who does not thereby intend to bind himself, is guilty of forgery.

INDICTMENT containing four counts, each for uttering a forged promissory note.

The notes described in the indictment were as follows :

“ Boston, Aug. 12, 1871. Three years after date we promise to pay to the order of ourselves twenty-six thousand dollars, value received. Payable at any bank in Boston with interest at $8\frac{1}{2}$ per cent semi-annually. Little & Co.”

“ Boston, Mass., Feb. 7, 1872. Six months after date I promise to pay to the order of myself thirty-eight hundred and eighty dollars, value received, with interest at $8\frac{1}{2}$ per cent. James H. Thompson.”

“ Boston, Feb. 19, 1872. Eight months after date, I promise to pay to the order of C. H. Foster, fifteen hundred and sixty-five $\frac{20}{100}$ dollars, value received, with interest at $8\frac{1}{2}$ per cent per annum. James H. Thompson.” Upon the margin of this note was written, “ Notify 154 Devonshire St.”

“ Boston, March 30, 1872. Six months after date, I promise to pay to the order of myself, six thousand two hundred and fifty dollars, value received. Interest at the rate of eight and one half per cent. W. C. Simmons.”

At the trial in the Superior Court, before BACON J., the government called one George P. Little, who testified as follows :

“ I am a broker at No. 10 State street; have been in business for three years in State street; at one time I was at No. 98 Washington street, and at another time I was at No. 26 $\frac{1}{2}$ Exchange street; I was trading in real estate; have known defendant half a dozen years; defendant sent for me to come down to his office, No. 130 State street, and I went down; he said he wanted me to make a large note; I said I had done business under the name of Little & Co., and he told me to sign it ‘ Little & Co.,’ and I did so, and made the note so signed, described in the first count; I gave the note to Foster, and he gave me ten dollars. I had no wrong intention in making the note; in trade it is sometimes done, that is, notes of this kind are made; the note was made August 12, 1871.”

Ebenezer N. Chaddock was then called, and said he was eighty years of age, and used to follow the sea. "In August, 1871, I held Foster's notes for a large amount; saw the notes signed 'Little & Co.' at Foster's office on the 12th or 13th of August, 1871, and took it of him and gave him up other notes of his and some Hicksville stock that I had for it. He indorsed the note, waiving demand and notice, and gave it to me. He represented that this Little & Co. was a large firm doing business on Franklin street, in Boston, and that they had a large manufactory in Charlestown. He said the note was secured by mortgage, and that he had caused the mortgage to be assigned to me, and that the assignment was at the Registry. I searched for Little & Co., but could not find any such firm. I went to Charlestown and made search, but could not find any such firm. Foster said the note was good, first quality. On February 19, 1872, I first saw the 'Thompson' notes. The first one I took that day, and gave Foster his own note in return. Foster told me at this time it was gilt-edged paper. He said Thompson was a member of a firm doing business at 154 Devonshire street, in Boston; that I should not find his name in the directory, for he had recently come from California and gone into the firm. I took the second 'Thompson' note March 4, 1872. He said it was the same man's note, and I gave him his own notes which I held to equal amount. I saw and took from Foster the 'Simmons' note, March 30. Foster said it was gilt-edged paper, and that Simmons was the son of John Simmons, a former wealthy merchant in Boston, and in the clothing business in Dock Square. I gave him in return his own notes I held. I never have been able to find any man by the name of James H. Thompson or of W. C. Simmons. Foster indorsed all the notes, waiving demand and notice. I continued to go to his office till July last. I asked him sometimes about these notes, and he said they would be paid at maturity. This last note was given for a horse; never gave Foster any money that he did not pay back to me. When I took these notes alleged to be forged, I thought Foster perfectly good; did not doubt him; did not doubt him before July, 1872; know Webber & Walker; were frequently in the office."

David G. Ranney testified: "Am a member of the firm of James L. Little & Co., on Franklin street; the members of our firm are James L. Little, James M. Dunbar, David G. Ranney, F. W. Haynes, James L. Little, Jr., Joseph A. Tilden; we have been thirteen years in Franklin street; no such firm as Little & Co. that I know of; this 'Little & Co.' note in the first count is not made by our firm, nor any member of it."

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Edward A. White testified: "John Simmons was my father-in-law; his last son died in the year 1858; their names were, Theodore A. Simmons, Lorenzo Simmons, and John Simmons, Jr.; this 'Simmons' note is not the note of any of those sons."

Wingate P. Sargent testified: "Am member of the firm of Sargent Brothers & Co.; in February, 1872, our firm occupied Nos. 152 and 154 Devonshire street, Boston; know of no person by name of James H. Thompson; no such person a member of our firm; these 'Thompson' notes not made by any member of our firm."

Abijah Thompson testified: "I am in the employ of Sargent Brothers & Co.; know of no such person as James H. Thompson at 154 Devonshire street."

Henry R. Smith testified: "I am in the employ of Jordan, Marsh & Co. since January 20th, last; was employed there two years ago. I wrote these notes, the two notes signed 'James H. Thompson.' I met a man named Levi Clark in a saloon, and he wanted me to go down State street with him, and I went to Foster's office with him. As we went in, Clark said to Foster, 'There is a man that will do that writing,' and Foster said, 'Let me see some of your writing;' and I sat down and wrote some cards, and he then handed me these notes in blank, and asked me to fill them up, and I did so, and asked him how I should sign them. He said, 'Sign any name,' and I signed the name 'James H. Thompson.' He told me to put down some place to notify, and I put down the number on Devonshire street, because Jordan, Marsh & Co. used to occupy that store, and I worked there. I never went by the name of Thompson."

Andrew M. Barton testified: "I am employed by Jordan & Marsh; firm was formerly at 154 Devonshire street, till 1870; knew Henry R. Smith, and never knew him by any other name; he is my nephew."

Hollis C. Pinkham testified: "I made search for Little & Co., in Charlestown and Boston, but could not find any such firm; could not find James H. Thompson; found that John Simmons' sons died in 1858."

The defendant introduced evidence tending to show that Henry R. Smith sometimes went by the name of Thompson, and was introduced to the defendant by that name.

W. C. Simmons, called for the defendant, testified that he made the note signed "W. C. Simmons."

On cross-examination he said: "I have lived in Boston ten years; was born in Duxbury, Mass., and am employed in an eating saloon in Boston, and have six dollars per week; have some money in the savings bank. I signed the note to accommodate Clark."

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He came into a store in North Market street, where I was, and said something to me, and soon went out and came in again, and brought a blank note, and I filled it up and signed and indorsed it. Clark promised to take care of it when due ; have done the same thing for a firm of the name of Pratt & Co. ; I did it to accommodate Clark ; I don't know where Clark is. After I made the note I gave it to Clark, and he went out, and in a few minutes he came back with Foster. Foster had the note, and showed it to me, and asked me if I made it, and it was all right. I told him yes, and it would be paid at maturity."

The defendant testified as follows : " The note signed ' Little & Co.' was given me by Little ; I gave him some money for it and some guano stock. I indorsed it and gave it to Capt. Chaddock, but did not make any of the representations in regard to it that Capt. Chaddock has testified. After the note was given, Little was in the office one day, and Capt. Chaddock asked me if that was the man who gave the note, and I told him it was. The ' Thompson ' notes were made in my office by a man whom Clark brought in and introduced as Thompson ; I never had seen him before ; my bargain was with Clark ; I had no reason to suppose his name was not Thompson ; he was introduced to me and Capt. Webber by that name ; Capt. Chaddock was in the office at the time. I purchased the ' Simmons ' note of Clark. I never made any representations like those testified to by Capt. Chaddock about the ' Thompson ' notes, nor about the ' Simmons ' notes. I never knew anything about John Simmons' sons, or that he had any. I had no intention of cheating Capt. Chaddock, and received nothing for these notes except notes of my own, which Chaddock held. I did not have any Hicksville stock, and never knew that there was any. I indorsed all these notes, waiving demand and notice."

The defendant requested the court to instruct the jury as follows :—

" 1. That if the jury find that the note signed ' Little & Co.' was signed by Geo. P. Little, who had formerly been a member of the firm of Little & Co., and it not appearing that there was any other firm of the name of Little & Co., the note could not be regarded as a forgery, and therefore the defendant could not be convicted of uttering forged paper under the first count in the indictment.

" 2. That the note signed ' Little & Co.' being the genuine signature of Geo. P. Little, no statements by the defendant as to the members of that firm could make said note a forgery, however false those statements may have been, provided it is not proved that there was in point of fact another firm in Boston doing business under the name of Little & Co.,

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and therefore the defendant cannot be convicted of uttering a forged note under the first count in the indictment.

“ 3. That if the two notes described in the second and third counts in the indictment, signed ‘ James H. Thompson,’ were made by the witness Smith, and the jury find that he was known in the community by different names, and that said Smith did not disclose his true name, and that the defendant did not know his name, but took said notes, supposing that they were the genuine notes of James H. Thompson, and passed them as such, the defendant cannot be convicted under the second and third counts in said indictment.

“ 4. That if the jury find that the note signed ‘ W. C. Simmons,’ described in the fourth count in said indictment, was the genuine signature of a man by that name, and that it is not proved that at the time of the making of said note there was another person of that name in Boston, then the note cannot be considered a forgery, and the defendant cannot be convicted under that count in the indictment.

“ 5. That although the jury should find that the defendant was guilty of making false pretenses as to the notes described in the indictment, yet he could not be found guilty under either count of the indictment, unless the jury find that there was another existing firm of the name of Little & Co., or other existing persons answering to the names of James H. Thompson or W. C. Simmons.

[The 6th and 7th prayers were given.]

“ 8. That if the jury find that the defendant indorsed all the notes described in the indictment, and thus rendered himself pecuniarily liable on them, and received in return for them only notes signed by them, this evidence would not warrant the jury in finding the intent to defraud.”

The court declined so to instruct the jury, but instructed them, among other things, as follows : “ There are three things which the government must prove in this case in this respect to each separate count : that the defendant passed a forged note ; that he knew it was forged when he passed it ; that he passed it with an intent to defraud.

“ If the defendant procured Little to make this note with the intention to pass it, at the time he procured him to do it, as the note of somebody else than the Little or ‘ Little & Co.,’ whose note it was, then it is forgery. It must be his intention at the time, and not formed after he had got the note from Little without any present intent to pass it, but afterward formed the idea that he might pass it as the note of another firm or of another person, such subsequent determination would not make it a forgery ; he must have had the intention at the time when he got the note executed. It matters not whether Little was innocent in the

transaction or not. If Little intended to aid Foster in putting this note into circulation as the note of another firm with which he had nothing to do, then he would be guilty of forgery. If Foster got it from him with that intention, and got him to do it without understanding it, it makes no difference; Foster is still guilty of forgery, for having procured the same thing to be done by an innocent party.

“The same general principle will apply to the ‘Thompson’ notes as applies to the first one; not exactly, however, in the same form, for the evidence is different here, and it is for you to say if Smith executed this note in the name of some other person than himself, in the name of a certain ‘James H. Thompson,’ alleged to do business at 154 Devonshire street, with the intention to defraud some one of his rights. That would be forgery in Smith. If Foster induced or hired Smith to do that with that intention, and Smith did it in Foster’s presence, it is forgery in Foster, and it is forgery in him whether Smith so understood it, or had that intention or not, if he intended him to make the note in the name of Thompson — in the name of a certain Thompson who did business in a certain place — and there is no such person, and with an intent to defraud; it is the making of a note in the name of a fictitious person, with an intent to defraud, and it is clearly in the law a forgery.

“The ‘Simmons’ note in the last count stands on the same general principles. Did the defendant induce a certain W. C. Simmons to make that note with the intention, at the time he induced him to make it, to pass it as the note of some other Simmons? If he did he is guilty of forgery, whether Simmons understood it or not, in the same way that I have explained with regard to Smith and Little.

“You are to take all the evidence in the case: if you find the notes to be forged; if you find the defendant knew they were forged; if you find he passed them knowing them to be forged, you are then to take these facts with all the other evidence in the case and say whether he intended to defraud or not.

“To state briefly and in as few words as I can: If Foster procured Little to make the note signed ‘Little & Co.,’ with the intent at the time to utter and pass it, not as the note of Little, the maker, or of any firm of which he was a member, but as the note of a certain firm other than the firm of which he was a member, having a place of business in Franklin street, and a place of business or manufactory in Charlestown, this makes the note a forgery, whether such firm is real or fictitious, if it is done with the purpose to deceive and defraud.

“If Foster procured the witness Smith to sign the ‘Thompson’ note, intending at the time to use them as the notes of James H. Thompson,

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having a place of business at 154 Devonshire street, and not of the person making it, for the purpose of deceit and fraud, this makes the two 'Thompson' notes forgeries."

G. A. Somerby & I. S. Morse, for defendant, cited *Commonwealth v. Baldwin*, 11 Gray, 197; *Rex v. Story*, Russ. & Ry. 81; *Rex v. Webb*, id. 405; S. C., 3 Brod. & Bing. 228; *Rex v. Watts*, Russ. & Ry. 436; S. C., 3 Brod. & Bing. 197; *The King v. Hevey*, 1 Leach (4th ed.), 229; *Regina v. White*, 1 Denison, 208; *Putnam v. Sullivan*, 4 Mass. 45.

C. R. Train, Attorney-General, for Commonwealth, cited *The Queen v. Blenkinsop*, 1 Denison, 276; *Regina v. Mitchell*, id. 281, note; *Regina v. Mahony*, 6 Cox's Crim. Cas. 487; *Regina v. Nisbett*, id. 320; *Regina v. Epps*, 4 Fost. & Fin. 81, 83; *Mead v. Young*, 4 T. S. 28; *The King v. Parkes*, 2 Leach (4th ed.), 775; *The King v. Taft*, 1 Leach, 172; *The King v. Sheppard*, id. 226; *The King v. Lockett*, id. 94; *The King v. Bolland*, id. 83; *The King v. Dunn*, id. 57; *Rex v. Marshall*, Russ. & Ry. 75; *Rex v. Whiley*, id. 80; *Rex v. Peacock*, id. 268; *Rex v. Francis*, id. 209; *Regina v. Richards*, 11 Cox's Crim. Cas. 43; *People v. Peacock*, 6 Cow. 72; *People v. Peabody*, 25 Wend. 472; *Barfield v. State*, 20 Ga. 127.

WELLS, J. Two questions are presented by the instructions in regard to the note signed "Little & Co." First, whether the fact that the manual operation of attaching the signature was performed by a person of the name of Little who had done business under the name of Little & Co., is compatible with a verdict finding the note to be a forgery. Second, whether it may be found to be a forgery on the part of the one who procures it to be so made, intending to use it as the note of some other party or pretended party and thereby defraud another, although Little was innocent of fraudulent intent, and signed the note without understanding the purpose for which it was procured.

Forgery is not necessarily counterfeiting. One definition quoted approvingly in *Commonwealth v. Ray*, 3 Gray, 441, is "the making a false instrument with intent to deceive." In *The King v. Parkes*, 2 Leach (4th ed.), 775, it is defined as "the false making a note or other instrument with intent to defraud."

By Gen. Stats., ch. 162, § 1, "whoever falsely makes" a promissory note, "with intent to injure or defraud any person," is punishable as for the offense of forgery. The falsity of the instrument consists in its purporting to be the note of some party other than the one actually making the signature. The falsity of the act consists in the intent that it shall pass and be received as the note of some other party. If there be simulation

or any device in or upon the instrument itself, adopted to make it appear to be the note of such other party, so that the falsity and its proof are both borne upon it, no one would doubt that the charge of forgery might be maintained, notwithstanding that the signature is of a name which might lawfully be used by the person who attached it to the note.

It matters not by whom the signature is attached, if it be not attached as his own. If the note is prepared for the purpose of being fraudulently used as the note of another person, it is falsely made. The question of forgery does not depend upon the presence upon the note itself of the indicia of falsity. If extrinsic circumstances are such as to facilitate the accomplishment of the cheat without the aid of any device in the note itself, the preparation of a note with intent to take advantage of those circumstances and use it falsely is "making a false instrument." If Little & Co., "a large firm doing business on Franklin street, Boston," and having "a large manufactory in Charlestown," were well known and in undoubted credit, and the Little & Co., of George P. Little, were of no credit and entirely unknown, and George P. Little made and signed the note, not as his own or as the note of his firm, but solely with a view to its use as the defendant in this case used it, all the elements, both of effect and intent, necessary to constitute the offense of forgery, would exist. The position of the case is the same, if the party defrauded knew nothing of either firm except from the representations of the defendant; and the supposed makers of the note did not in fact exist at all. *United States v. Turner*, 7 Pet. 132.

The distinction is plainly drawn in *Commonwealth v. Baldwin*, 11 Gray, 197, between one who assumes to bind another, either jointly with himself, or by procuration, however groundless and false may be his pretense of authority so to do, and one who signs in such manner that the instrument may purport to bear the actual signature of another party having the same name, and intending that it shall be so received. It purports to be the instrument of such other party, among those not familiar with his handwriting, by bearing his name; and it is a false instrument, and falsely made, if it was so intended. *Commonwealth v. Stephenson*, 11 Cush. 481.

The second question is, in a measure, involved in the first. To constitute forgery, where there has been no subsequent alteration, the fraudulent intent must attend the making of the instrument. But it is not necessary that it should be in the mind of the one whose hand holds the pen in writing the signature. If that is done at the dictation or request of another, and for his purposes and use, and his designs are fraudulent so as to make it forgery if he had written it himself, then the instrument

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is a forged one. *Commonwealth v. Stevens*, 10 Mass. 181; *Commonwealth v. Ray*, 3 Gray, 441. The circumstance that the person so employed bore the same name as that subscribed to the instrument, makes it necessary that it should be made to appear not to have been a genuine transaction; and that the signature was not attached to the paper as a contract of the one who wrote it. If he signed it without understanding its purpose, thoughtlessly, or from unfamiliarity with business matters, or being himself deceived, he might not be guilty of a criminal offense. and yet the instrument might be a forgery, so that the one who procured it to be so made might be convicted either of the crime of forgery or of uttering a forged instrument.

The foregoing propositions are all amply sustained by the authorities cited in behalf of the Commonwealth.

Of those cited by the defendant, *Regina v. White*, 1 Denison, 208, was a case of false assumption of authority to bind another, and came within the distinction pointed out in *Commonwealth v. Baldwin*, 11 Gray, 197.

In *The King v. Hevey*, 1 Leach (4th ed.), 229, the indorsement was found to be genuine, and the fraud of the defendant consisted in representing himself to be the party who made it. It was held that that did not constitute forgery.

In *Rex v. Story*, Russ. & Ry. 81, there was false representation only; there was no false signature.

In *Rex v. Webb*, Russ. & Ry. 405, there was a genuine acceptance, but the bill was addressed to the drawee by a false description as to residence and occupation. There was no person in fact of that name, answering to the description, and no proof of false representations as to the acceptor, aside from what was borne on the paper. It did not appear, therefore, that there was a fraudulent purpose to pass the bill as an acceptance of another person than the real drawee, either real or fictitious. In 1 Gabbett's Crim. Law, 368, it is remarked of this case, "As there was no falsity in the signature of the drawer or acceptor, the transaction was therefore rather in the nature of a cheat or false pretense than a forgery."

All these cases lack the essential element of an intent, when making a signature, or procuring it to be made, to pass it off fraudulently as the signature of another party than the one who made it. When that intent exists, and the instrument is the fruit of it, the author of the fraud cannot escape the charge of forgery by procuring one who happens to bear a name that suits his purpose to supply him with a pretended genuine signature. There is double falsity in such a mock performance.

The instructions to the jury were in strict conformity to these views.

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They presented clearly and explicitly the precise questions which arose upon the testimony. The several propositions were carefully stated, and well adapted to the case. We see no ground of exception to the instructions given; nor to the refusal to give those prayed for and not given.

The third prayer contains a proposition which, if well founded in the facts or supported by testimony, might properly have been given to the jury. It is, in substance, that if the defendant took the notes described in the second and third counts "supposing that they were the genuine notes of James H. Thompson, and passed them as such," he cannot be convicted on those counts: But it is a matter of discretion with the presiding judge whether to adopt the hypothetical form in which an instruction is prayed for, or to present the legal proposition it contains by a direct statement of what is necessary to be established in order to convict. Upon this point the exceptions show that the judge did instruct the jury that the government must prove, not only that the note was a forgery, but that the defendant, when he passed it, knew it to be a forgery. And still again, that three things must be shown in respect to each separate count: "that the defendant passed a forged note; that he knew it was forged when he passed it; that he passed it with intent to defraud." The jury found the facts contrary to the hypothesis of the defendant's prayer.

In other respects the case in regard to the 'Thompson' notes, and also the 'Simmons' note, is the same as in regard to that of Little & Co.

The eighth prayer presents only a question of fact for the jury.

Exceptions overruled.

COMMONWEALTH V. ADAMS.

(114 Mass. 323.)

Criminal assault and battery — negligence.

One who negligently drives over another is not guilty of a criminal assault and battery, although he does it while violating a city ordinance against fast driving.

ACTION for assault and battery. At the trial in the Superior Court before BACON, J., it appeared that the defendant was driving in a sleigh down Beacon street, and was approaching the intersection of Charles street, when a team occupied the crossing. The defendant endeavored

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to pass the team while driving at a rate prohibited by an ordinance of the city of Boston. In so doing, he ran against and knocked down a boy who was crossing Beacon street. No special intent on the part of the defendant to injure the boy was shown. The defendant had pleaded guilty to a complaint for fast driving, in violation of the city ordinance. The Commonwealth asked for a verdict, upon the ground that the intent to violate the city ordinance supplied the intent necessary to sustain the charge of assault and battery. The court so ruled, and thereupon the defendant submitted to a verdict of guilty, and the judge, at the defendant's request, reported the case for the determination of this court.

A. Russ, for defendant.

C. R. Train, Attorney-General, for Commonwealth.

ENDICOTT, J. We are of opinion that the ruling in this case cannot be sustained. It is true that one in pursuit of an unlawful act may sometimes be punished for another act done without design and by mistake, if the act done was one for which he could have been punished if done willfully. But the act, to be unlawful in this sense, must be an act bad in itself, and done with an evil intent; and the law has always made this distinction: that if the act the party was doing was merely *malum prohibitum*, he shall not be punishable for the act arising from misfortune or mistake; but if *malum in se*, it is otherwise. 1 Hale's P. C. 39; Foster's C. L. 259. Acts *mala in se* include, in addition to felonies, all breaches of public order, injuries to persons or property, outrages upon public decency or good morals, and breaches of official duty, when done willfully or corruptly. Acts *mala prohibita* include any matter forbidden or commanded by statute, but not otherwise wrong. 3 Greenl. Ev., § 1. It is within the last class that the city ordinance of Boston falls, prohibiting driving more than six miles an hour in the streets.

Besides, to prove the violation of such an ordinance, it is not necessary to show that it was done willfully or corruptly. The ordinance declares a certain thing to be illegal; it therefore becomes illegal to do it, without a wrong motive charged or necessary to be proved; and the court is bound to administer the penalty, although there is an entire want of design. *The King v. Sainsbury*, 4 T. R. 451, 457. It was held in *Commonwealth v. Worcester*, 3 Pick. 462, that proof only of the fact that the party was driving faster than the ordinance allowed was sufficient for conviction. See *Commonwealth v. Fairen*, 9 Allen, 489; *Commonwealth v. Waite*, 11 id. 204. It is therefore immaterial whether a party violates the ordinance willfully or not. The offense consists, not

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in the intent with which the act is done, but in doing the act prohibited, but not otherwise wrong. It is obvious, therefore, that the violation of the ordinance does not in itself supply the intent to do another act which requires a criminal intent to be proved. The learned judge erred in ruling that the intent to violate the ordinance in itself supplied the intent to sustain the charge of assault and battery. The verdict must therefore be set aside, and a *New trial granted.*

FAVOR V. BOSTON AND LOWELL RAILROAD CORPORATION.

(114 Mass. 350.)

Railroad — over highway — frightening horses.

A railroad corporation whose road passes over a highway by a bridge is not liable to a traveler in the highway for damage caused by the fright of his horse at the noise made by a train of cars passing over the bridge in the customary manner, although the corporation know that, because of special circumstances, accidents of a similar character are peculiarly liable to happen there, and although they give no warning of the approach of the train.

TORT for damage caused to the plaintiff while passing along a highway under a railroad bridge, by his horse taking fright at the noise made by cars upon the bridge.

At the trial in the Superior Court, before ALLEN, J., the plaintiff's counsel, in opening the case to the jury, stated that he should rely upon proof that the defendants' track crossed, by a bridge, over a public way called Gorham street, in the city of Lowell; that this street was a much traveled and frequented thoroughfare; that all the travel passed under the bridge and track; that travelers approaching the bridge could not see the track or the coming trains, because of the buildings which line the street, and because of bends in the track, and for other reasons; that it was a place of extreme peril and danger to the traveling public; that for many years frequent accidents had happened, from the frightening of horses upon the street, as they passed under the bridge, by the sudden passing of cars over the bridge; that all these facts were known to the defendants; that their custom was to give no warning of approaching trains, many of which pass daily; that competent men would testify to the extreme peril of the place, and that further precautions and warnings were required of the defendants by due and reasonable care on their part; that upon this particular occasion the plaintiff was driving under

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the bridge in the public way and exercising due care, and the defendants, without giving any warning whatever of the train, ran the cars upon and over the bridge, thereby frightening the plaintiff's horse, upsetting his wagon, and producing the injury ; that reasonable and due care and warning on the part of the defendants would, in all reasonable probability, have prevented the accident ; and that the plaintiff, although he made due inquiries and exercised due and reasonable precaution and care before driving under the bridge, did not know of the approach of the defendants' train until it was upon the bridge, and until it was too late to prevent the accident.

The defendants objected that these facts, if proved, would not be competent and would not sustain the action ; and the court, before verdict, by consent of parties, reported the question of law thus arising in the case to this court. If proof of the facts stated was competent and was sufficient to sustain the action, a trial was to be had, otherwise judgment was to be entered for the defendants.

G. Stevens & W. H. Anderson, for plaintiff.

D. S. Richardson & J. F. McEvoy, for defendants.

ENDICOTT, J. Much of the evidence offered by the plaintiff was clearly incompetent, but the real question reported for decision arises upon the following facts : The plaintiff, while traveling with his horse and wagon on Gorham street in Lowell, passed under the bridge of the defendants' railroad, which crosses Gorham street, and while so doing, and in the exercise of due care, a train of the defendants passed over the bridge, and the plaintiff's horse, frightened by the noise, became unmanageable, upset the wagon, and the plaintiff was injured. No signal or warning was given of the approach of the train to the bridge. It does not appear that the defendants were guilty of any special negligence, unless the failure to give a signal was negligence, but ran their train in the usual manner, making no more noise than generally attends the running of a railroad train. The only question, therefore, is, whether it was the duty of the defendants to give notice or warning to travelers on the highway of the approach of the train to the bridge.

Where a railroad crosses a highway at grade, the law imposes upon it the duty of giving notice to travelers of the approach of its trains. The statutes also prescribe certain signals to be given by the railroad at all crossings at grade. Gen. Stats., ch. 63, § 84 ; Stat. 1862, ch. 81. Mere compliance with the statute provisions is not sufficient, but the railroad is bound

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to use all such reasonable care, in addition to the statute requirements, as the circumstances of each case may seem to demand. *Linfield v. Old Colony Railroad Co.*, 10 Cush. 562, 569. This rule applies because at grade crossings the traveler on the highway and the railroad enjoy a common privilege on the highway itself; and each must use such privilege with due regard to the safety and rights of the other. *Shaw v. Boston & Worcester Railroad Co.*, 8 Gray, 45, 66. And as a train of cars is a dangerous power when in motion, and capable of doing a great injury, a high degree of care is demanded of the railroad in controlling it, and some notice of its approach to the highway is required both by the rules of the common law and by statute.

But where a railroad crosses a highway by a bridge, it does not in common with a traveler have any privilege in or use of the highway itself. Though the tract and the highway are near and adjacent to each other, they are entirely distinct and separate. The railroad has no rights in the highway, and consequently the same duties are not imposed upon it that are imposed when it passes over the highway itself in common with the traveler. It has the right to use its road-bed and bridge, as a railroad may use them, by running its trains at a common rate of speed, accompanied by the usual noise attendant upon such exercise of its rights. It is not bound by law to notify the traveler of its intention to use its bridge in the ordinary and usual manner. And no statute requires it to do so. However objectionable the customary noise of a railroad train may be to a traveler on the highway, or to persons living near the track, no question of care or legal responsibility is involved in the relation of the parties, and the railroad company, in doing that which it is authorized by the law to do, is not guilty of a nuisance. It has the right to lawful acts upon its own premises, and is not responsible for injurious consequences that may arise from such acts, unless the acts are negligently and improperly done. If the defendants in this case had done some negligent act in the immediate vicinity of the highway, calculated to endanger the safety of travelers passing over it with horses, a very different question would have been presented. But no evidence is offered of such act, and the mere omission to give warning of the approach of the train is not such negligence that the plaintiff can maintain his action.

Judgment for the defendant

Chandler v. Sanger.

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(114 Mass. 364.)

Duress of property — payment under.

A payment by a person to free his goods from an attachment, put on for the purpose of extorting money, by one who knows that he has no cause of action, is a payment under duress, and the money paid can be recovered back in an action for money had and received, without proof of the termination of the suit in which the attachment was made.*

CONTRACT for money had and received. At the trial in the Superior Court, before ROCKWELL, J., the plaintiff, in opening his case, stated that he expected to prove that the plaintiff was a dealer in ice, and furnished ice each week day to parties in Boston, under contracts to furnish a certain amount daily, upon all week days; that his custom was to have his carts loaded by twelve o'clock on Sunday night, in order to start early Monday morning; that any failure on the part of the plaintiff to furnish his customers with ice on Monday would be a great injury to him; that Monday morning, July 12, 1869, he had standing in his sheds at Brighton, adjoining his ice-house, five heavy two-horse teams loaded with ice, ready to start for Boston before light that the defendant Sanger held his promissory note and had proved it against his estate in insolvency; that in the insolvency proceeding he had obtained his discharge; that the defendants knew these facts; that the defendant Sanger and other defendant, who was an attorney-at-law, brought an action on this promissory note, under circumstances which would satisfy the jury that the action was commenced and carried on by them fraudulently, with the purpose of extorting money from the plaintiff by duress, under color of legal process; that in pursuance of this purpose, they went about two o'clock on Monday morning with a writ in the hands of an officer and made an attachment of the carts, horses and harnesses; that the attorney at law, who had been with the officer in making the attachment, went to the plaintiff's house and informed him of the attachment, and told him that none of the property so attached could go to Boston unless the claim should first be settled by the payment of \$300; that the plaintiff told the attorney that he did not owe any thing, and said he would dissolve the attachment by giving a bond; that the attorney then told him that it would take three days to dissolve it, and that

* See also *Spaids v. Barrett*, 11 Am. Rep. 10.

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for that time the property would be held under it, and that his discharge in insolvency did not cut off the claim ; that the plaintiff believed these statements, and being ignorant of the method of dissolving attachments, and being in fear of great loss in his business, to relieve the property from attachment, he paid the \$300 to the attorney under protest, stating that he should claim and enforce his rights, and recover back the money.

The presiding judge being of the opinion that these facts, if proved would not sustain the action, so ruled ; whereupon, by consent of the parties, he reported the case to this court for their decision. It was agreed that if the court should be of opinion that these facts, if proved, were sufficient to sustain the action, then it was to stand for trial ; otherwise judgment was to be entered for the defendants.

G. Stevens & J. F. Colby, for plaintiff.

T. H. Sweetser (J. W. Hammond with him), for defendants.

GRAY J. This is not an action of tort, to recover damages for malicious prosecution, or abuse of legal process, but an action of contract, in the nature of assumpsit, for money had and received by the defendants, which they have no legal or equitable right to retain as against the plaintiff. Although the process sued out for the defendant was in due form, yet if, as was offered to be proved at the trial, he fraudulently, and knowing that he had no just claim against the plaintiff, arrested his body or seized his goods thereon, for the purpose of extorting money from him, then, according to all the authorities, the payment of money by the plaintiff, in order to release himself or his goods from such fraudulent and wrongful detention, was not voluntary, but by compulsion ; and the money so paid may be recovered back, without proof of such a termination of the former suit as would be necessary to maintain an action for malicious prosecution. *Watkins v. Baird*, 6 Mass. 507 ; SHAW, C. J., in *Preston v. Boston*, 12 Pick. 714 ; *Benson v. Monroe*, 7 Cush. 125, 131 ; *Carew v. Rutherford*, 106 Mass. 1, 11 *et seq.* ; *Richardson v. Duncan*, 3 N. H. 508 ; *Sartwell v. Horton*, 28 Vt. 370 ; GIBSON, C. J., in *Colwell v. Peden*, 3 Watts, 327, 328 ; *Cadaval v. Collins*, 4 A. & E. 858 ; S. C., 6 Nev. & Nan. 324 ; PARKE, B., in *Oates v. Hudson*, 6 Exch. 346, 348, and in *Parker v. Bristol & Exeter Railway Co.*, id. 702. 705.

New trial ordered.

Garnett v. Garnett.

GARNETT v. GARNETT.

(114 Mass. 379.)

Divorce — insanity of parties.

The fact that both parties were insane when a petition was filed under St. 1873, ch. 371, § 3 (which provides that an absolute divorce may be decreed upon the petition of one divorced *nisi*), is not a conclusive reason for dismissing the petition ; and the fact that the divorce *nisi* was obtained while they were sane does not make it a matter of course, that an absolute divorce should be granted ; and a statement of facts agreed by the guardians does not free the court from its duty to dispose of the cases as public policy and the interests of the parties require. (*See note, p. 371.*)

PETITION filed at October term, 1873, under St. 1873, ch. 371, § 3, for an absolute divorce from the bond of matrimony. The case was submitted to the court upon an agreed statement of facts as follows :

The petitioner and the respondent were duly married to each other May 10, 1865, and thereafter lived together, as husband and wife, in the county of Middlesex. At April term, 1873, of this court, the petitioner had duly obtained a decree of divorce *nisi*, under St. 1870, ch. 404 from the bond of matrimony, from the respondent, for cruel and abusive treatment, and for gross and confirmed habits of intoxication, contracted since said marriage. Since this decree *nisi*, the parties have not lived together. Both parties are under guardianship, as insane persons. George Stevens, the counsel for the petitioner, is his guardian ; and Charles Cowley, the counsel for the respondent, is her guardian. Both were duly appointed by the judge of probate, for the county of Middlesex, since the decree *nisi*, and before the bringing of this petition. These guardians were duly appointed guardians *ad litem* for their respective clients, in this proceeding. If, upon the foregoing facts, the court are of opinion that the petition can be maintained, then the decree is to be made absolute, and the case is to stand for such other decrees upon the petition as may be proper ; otherwise, the petition is to be dismissed without prejudice.

G. Stevens, for petitioner.

C. Cowley, for respondent.

GRAY, C. J. By the law of this Commonwealth, a libel for divorce may be filed and presented in behalf of an insane person, either by the guardian of the party, or by a next friend appointed by the court for

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the purpose. Rev. Sts., ch. 76, § 12, and Commissioners' note; Gen. Sts., ch. 107, § 16; *Denny v. Denny*, 8 Allen, 311. And if, at any time during the pendency of the suit, the respondent is insane, whether such insanity began before or since the filing of the libel, the defense may be conducted by a guardian appointed by the Probate Court, or, if there is no such guardian, by one appointed by the court in which the libel is pending; and if upon a hearing sufficient cause is shown, a divorce may be decreed. *Broadstreet v. Broadstreet*, 7 Mass. 474; *Mansfield v. Mansfield*, 13 Mass. 412; Rev. Stats., ch. 76, § 18, and Commissioners' note; *Little v. Little*, 13 Gray, 264; Gen. Stats., ch. 107, § 21. The fact, if satisfactorily established, that both parties were insane when the present petition was filed, therefore affords no conclusive reason for dismissing it.

A divorce *nisi* under the St. of 1870, ch. 404, is substantially equivalent to a divorce from bed and board, and does not dissolve the marriage; and an application, by a party who has obtained such a divorce, for a divorce from the bonds of matrimony, is a new proceeding, requiring notice to the adverse party, and a hearing by the court. *Graves v. Graves*, 108 Mass. 314; *Edgerly v. Edgerly*, 112 id. 53; St. 1873, ch. 371 § 3. The fact that, while both parties were of sound mind, a divorce *nisi* was obtained, does not therefore require the court, as a matter of course, to enter an absolute decree of divorce from the bond of matrimony after either or both of the parties have become insane.

But the facts agreed in the case stated are not sufficient to enable the court to enter a final decree, either granting or refusing the divorce prayed for. Being under guardianship as an insane person is but *prima facie* evidence of actual insanity. *Stone v. Damon*, 12 Mass. 488; *Breed v. Pratt*, 18 Pick. 115; *Crowninshield v. Crowninshield*, 2 Gray, 524; *Little v. Little*, 13 id. 264. Even a person who is incapable of managing property, or of transacting the ordinary affairs of life, or of contracting a valid marriage, may yet have feelings and interests entitled to serious consideration in determining whether the *status* and relation of marriage shall or shall not continue. *Winslow v. Winslow*, 7 Mass. 96; *Middleborough v. Rochester*, 12 id. 363; *Holyoke v. Haskins*, 5 Pick. 20, 26; *Allis v. Morton*, 4 Gray, 63. The nature and degree and probable duration of the insanity of either party may have an important bearing upon the questions whether the hearing of the case shall be postponed and how it shall be decided. The difficulty of ascertaining the real facts, when either party is incapable of testifying or of instructing counsel, requires the court to proceed with the utmost caution, especially when the object of the suit is to obtain a complete dissolution of the

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marriage without the intelligent consent of the libellant. The agreement of guardians or of counsel to submit the case to a final determination upon an imperfect statement of the facts cannot relieve the court from the responsibility of considering what course public policy and the best interests of the parties require to be pursued. The case must therefore stand for further hearing.

NOTE.—In the celebrated case of *Mordaunt v. Moncrieffe*, L. R. 2 S. C. & D. 379, a petition for a divorce against a wife was met by an allegation of her insanity and consequent inability to defend herself. The Court below appointed a guardian *ad litem* on her behalf. Upon a verdict of her insanity, proceedings were suspended; but with liberty to the husband to apply again to the Court in the event of her recovery. The husband appealed to the House of Lords, insisting that the wife's insanity ought not to bar, or impede, the investigation of the charge of adultery brought against her. The House adopted this view; and reversing the order appealed against, sent the case back with directions to proceed. Lord CHELMSFORD was of opinion that the question, whether proceedings for the dissolution of a marriage can be instituted *on behalf* of a lunatic husband or wife, it was unnecessary to determine. The consulted judges, Chief Baron KELLY, Mr. Justice DENMAN and Mr. Baron POLLOCK, concurred in holding that divorce may be asked and decreed, on behalf of, or against, a lunatic, the court appointing a guardian *ad litem* for protection; but Mr. Justice KEATING and Mr. Justice BRETT were of opinion that the insanity of either husband or wife is an absolute bar to divorce. Lord Hatherly was of opinion that adultery not being a crime, the proceeding in divorce was not a criminal proceeding and not arrested by the lunacy of the defendant.

In *Rathbun v. Rathbun*, 40 How. Pr. 328, it was held by the Supreme Court at special term that the fact that the defendant in a divorce suit was insane when the suit was brought and so continued, was no defense when he was sane when the adultery complained of was committed.—REP.

HOYT V. CASEY.

(114 Mass. 397.)

Infant — liability for necessities.

A minor child will not be liable for necessities furnished him, merely because his father is poor and unable himself to pay for them.

CONTRACT on an account annexed to recover the sum of \$47.25 for medical attendance and medicine. The defendant answered that he was a minor under the age of twenty-one years. The plaintiff replied that the sum sued for was for necessities furnished the defendant suitable to his estate and degree.

At the trial in the Superior Court, before WILKINSON, J., it was agreed that the plaintiff was a practising physician, and that he attended the defendant professionally and furnished him medicines, as charged in the account annexed.

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The defendant's mother testified that he was not twenty-one years of age, and that at the time of his sickness he resided at home with his parents, who kept house; that the defendant's father was very poor and was unable to pay his bills at the time of and before and after the defendant's sickness. The defendant testified that he lived at home with his parents at the time of his sickness; that he had worked in one place for four years; and that he always received and receipted for his own pay and carried it home and gave it to his father.

In behalf of the plaintiff it was testified that the father had had his poll taxes abated because he was too poor to pay them; that he was ejected from the house in which he lived because he could not pay the rent, and the plaintiff testified that he knew that the defendant's father was very poor and unable to pay for necessities furnished to his son; that he would not and did not give any credit to the father, but gave the defendant himself the credit and made the charges to no one else; and that since the sickness, but before he was twenty-one years old, the defendant had at various times, when asked for the amount of the bill, promised the plaintiff to pay it. It did not appear that the defendant was informed the charges were made to him till after the services had been rendered.

The judge among other things instructed the jury that the poverty of the father would not be sufficient to render the son liable for necessities furnished to him, but that the plaintiff must go further and show a refusal or neglect of the father to furnish them. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

W. B. Gale, for plaintiff.

P. H. Cooney, for defendant.

DEVENS, J. In this case it did not appear at whose request the services for the value of which this action was brought were rendered, or that any information was given the defendant, who was a minor residing in the house of his father, until after the services were performed, that any charges were being made against him therefor, or that he was expected to pay for the same. After the services were rendered, but during his minority, there was evidence that the defendant said that he would pay for such services, but this could have no binding effect as a legal promise. His liability must depend upon the condition of things at the time of the rendition of the services. If a ratification by the minor were relied upon to charge him, it must be one made after his

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arrival at full age. *Boyden v. Boyden*, 9 Metc. 519; *Morse v. Wheeler*, 4 Allen, 570.

We are of opinion that the instruction to the jury that the poverty of the father would not be sufficient to render the son liable for the necessities furnished to him, but that the plaintiff must go further and show a refusal or neglect of the father to furnish them, was sufficiently favorable to the plaintiff. An infant, when residing at home and under the care of his father and supported by him, is not liable even for necessities. If he were, the father would be deprived of his right to determine what the character of that support should be. *Bainbridge v. Pickering*, 2 W. Bl. 1325; 1 Esp. N. P. 165; *Wailing v. Toll*, 9 Johns. 141; *Angel v. McLellan*, 16 Mass. 28. Nor do we think that a case can be excepted from this well-recognized principle because the father is found to be a poor man. When necessary professional services are rendered to a minor son residing in the house of his father, the legal inference is that the father is the person liable therefor. In the present case the father was keeping a family together, and was receiving the wages of this minor. While it was proved that he was unable to pay the debts he had incurred, he was, so far as it appeared, doing his best with the means at his command to provide for his family. No refusal or neglect to perform his duty of supporting the son was shown, although from his impoverished condition it may perhaps be fairly inferred that such duty could be but imperfectly performed. Ordinarily when one renders to another valuable service, the law will imply a promise to pay therefor by him for whom such service is rendered, and this upon the ground that as such party cannot infer service of this character to be gratuitous, it must be implied that he promised to pay for it; but no such implication can arise against a minor residing with his father, delivering over to him his wages and entitled to look to him for support.

Upon the evidence in the present case all the elements exist which are necessary to make the father liable. The plaintiff could not fix a liability upon the son by giving the credit to him for services without the knowledge of either father or the son. Whether such liability had been incurred must be determined by the facts, with which both parties were acquainted.

Exceptions overruled.

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PERKINS v. LADD.

(114 Mass. 420.)

Action — against one interfering with estate of deceased person.

One, who, as the widow's agent, in good faith sells perishable property of the estate of the dead husband and accounts for the proceeds, is not liable to an administrator afterwards appointed.

TORT, brought by the administrator of the estate of Frank A. Rolfe for the conversion of two horses belonging to the estate.

At the trial in the Supreme Court, before LORD, J., there was evidence to show that the plaintiff's intestate, an officer in the United States army, was killed in the battle of the Wilderness in 1864; that his horses, sword and various other articles were sent by the general of the army to Washington, D. C., directed to the care of the defendant, a paymaster in the United States army, who forthwith forwarded all the articles, except the horses, to the widow of the deceased at Lawrence, Mass., where she then resided; that the horses were sick and diseased and in bad condition; that they were put in a stable under the charge of a stable-keeper, and that the defendant sought of the widow directions as to what disposition should be made of them; that she thereupon directed him to have them sold at Washington, and to send her the proceeds; and that the defendant, in accordance with her directions, employed an auctioneer to sell them for her at public auction, and sent her the proceeds, which she received; that the stable-keeper's charge for keeping was \$1.00 per day for each horse; that the defendant never acted or claimed to act concerning the horses except in accordance with the directions of the widow; that he never had any personal benefit from the horses or the proceeds, and that he charged nothing for his services; and that these transactions all took place within a few weeks of Rolfe's death.

The plaintiff contended that the defendant acted for himself, and that he neither was, nor could be, justified in what he did touching the disposal of the horses by any power which the intestate's widow did or could confer upon him. He also contended that the sale was a pretended one, made pursuant to a secret arrangement between the defendant and the auctioneer, by which the possession of the horses, or of one of them, passed to the defendant, in fraud of the plaintiff's intestate's estate.

The court instructed the jury that under the laws of Massachusetts the widow was *prima facie* entitled to administer upon the estate of her deceased husband; that if Mrs. Rolfe, immediately upon knowing that the effects of her deceased husband were in care of the defendant at

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Washington, requested him to act in reference to them in her behalf, and he did so act in good faith (said property being perishable in its nature), and made the sale as her agent and at her request, and in all respects accounted with her for all which he received, that he was not liable; but that if he undertook in any manner to act in his own behalf, or to secure for himself directly or indirectly any benefit from the sale of the horses, or if there was any secret arrangement or understanding between himself and the auctioneer that he was to become possessed of one or of both the horses under a pretended sale, then the action might be maintained, and he would be liable for the value of the horses to the present plaintiff.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

C. Cowley, for plaintiff.

D. S. & G. F. Richardson, for defendant.

DEVENS, J. The rights of the plaintiff, who seeks to recover here for an alleged conversion of the property of his intestate, must be governed by the principles which would control in an action for wrongful intermeddling with the estate by one who it was claimed had thereby rendered himself liable as executor *de son tort*. Under Gen. Sts., ch. 94, § 14, any one intermeddling injuriously with the estate of a deceased person, without being thereto authorized by law, is liable to the persons aggrieved as an executor in his own wrong; and by section 15 of the same chapter, every executor in his own wrong is liable to the rightful executor or administrator for the full value of the goods taken by him, and for all damage caused by his acts to the estate of the deceased.

Upon the evidence in the case, the defendant was rightfully in possession of the horses, the value of which is sued for, the intestate having been an officer of the United States army, killed at the battle of the Wilderness in 1864, and his effects having been, by direction of the commanding general, placed in charge of the defendant, who was then a paymaster in the army. Under the instructions, the jury must have found that, upon being informed that the effects of the intestate were in the care of the defendant at Washington, his widow requested him to act for her in reference to them; that he did so in good faith; that, the property being perishable in its nature (consisting of horses diseased and in bad condition, which could only be kept at great and disproportionate expense), he, in compliance with her directions, sold them and remitted

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to her the proceeds ; and that he in no manner acted in his own behalf, nor in any way, directly or indirectly, secured to himself any benefit from the transaction.

The acts of the defendant, upon which it is sought to charge him, were done in 1864, and it would be unfortunate in the present case if the general principles of law were such as to compel us to charge the defendant (who appears to have acted throughout with the honorable purpose of saving the effects of a fellow-soldier, and neither to have asked nor received compensation for his services) with liability in a suit brought so long after the transactions referred to. We are of the opinion that they do not so compel us, and that the ruling under which a verdict was rendered for the defendant is not open to exception.

Upon the death of a person, a short time must necessarily elapse before title to his personal property can be acquired by the issue of letters testamentary or of administration. Within this period, however, many acts must be done if such property is to be suitably preserved. Goods must be stored, animals fed and cared for, and perishable property must be disposed of. As by Gen. Sts., ch. 94, § 1, the widow, or next of kin, or both, as the Probate Court shall see fit, are entitled to the administration, no person can be more suitable than the widow to take such temporary charge of the property. We are to consider whether one who aids her in this, acting simply as her servant and agent, becomes liable for the value of the goods which he thus assists her in caring for, and, when the property is perishable, in disposing of.

It was formerly held, with great strictness, that no one could interfere in the least with the estate of a deceased person. This was carried to such an extent, that a wife has been held liable as executrix *de son tort* for milking the cow of her deceased husband. *Garret v. Carpenter*, 2 Dyer, 166, note. But it is now determined that there are many acts which do not make one liable, such as locking up the goods of the deceased for preservation, directing the funeral and paying the expenses thereof, feeding his cattle, etc., for these are necessary acts of kindness and of charity. 1 Williams on Executors (4th Am. ed.), 214, and cases there cited ; *Camden v. Fletcher*, 4 M. & W. 378.

In *Padget v. Priest*, 2 T. R. 97, Mr. Justice BULLER intimates that if the defendant had acted merely as the servant of another, he should not be held liable. In *Brown v. Sullivan*, 22 Ind. 359, it was held that taking possession of property at the request of the widow of the deceased, for the purpose of taking care of it, did not make one liable as executor *de son tort*. In *Givens v. Higgins*, 4 McCord, 286, it was held that one acting as agent for the widow, and not knowing in what character

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she was acting, would be considered as her agent merely, and not as exercising such control over the funds of the estate as to make himself liable. In this case the defendant had, by direction of the widow, transferred certain property of the deceased in payment of one of his debts. In *Magner v. Ryan*, 19 Mo. 196, it was held that a person who had, by direction of the widow, sold certain goods and paid over to her the proceeds, was not liable as executor *de son tort*, and that no one was liable as such for acts in reference to the administration of an estate, which he had done merely as the servant of another.

Both these last cases go much further than the present case, and perhaps further than we should be willing to go. The rules against intermeddling with the estates of deceased persons are important, as the interval of time between the decease and the appointment of an administrator affords opportunities of which evil disposed or even intrusive and officious persons should not be allowed to take advantage, by interfering with the administration of the person who may thereafter be appointed. When, however, one can show (and this is all that is requisite in order to sustain the ruling of the presiding judge) that he has acted in good faith, at the request of the party entitled to administration, in doing an act in disposing of perishable property apparently necessary for the purpose of having its proceeds reach those entitled to them, and has paid over the proceeds to the party at whose request he has thus acted, he is not responsible for a wrongful conversion of the property.

Exceptions overruled.

HARTFORD V. BRADY.

(114 Mass. 466.)

Highway — driving cattle in — liability of owner for injury to adjoining property.

When cattle properly driven upon the highway escape upon unfenced adjoining land, their owner is not liable therefor, if he makes reasonable efforts to remove them and to prevent damage.

When by the wrongful acts of a stranger the cattle of A. are driven upon the land of B., the owner of them is not liable to B. in an action of tort.

TORT for damage done by the defendant's cattle.

The first count in the declaration, which was the count on which the plaintiff relied, was as follows: "And the plaintiff says that November

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21, 1871, he was, and ever since has been, lawfully seized and possessed of a certain tract of land in Watertown, [describing it.] And the plaintiff says, that the defendant, November 21, 1871, at said Watertown, had in his possession a certain number of cattle, to wit, fifty; and that said Brady had the care, government and direction of said drove of cattle, which were being driven from said Watertown to the town of Brighton, in said county of Middlesex, on the public highway, near the aforesaid close of the plaintiff; that said Brady, not minding nor regarding his duty in this behalf, then and there by his said servants so carelessly, negligently and unskillfully managed and behaved himself in this behalf, and so ignorantly, carelessly and negligently drove, managed, guided and governed said drove of cattle, that said drove of cattle, for want of good and sufficient care and management thereof, as aforesaid, then and there broke and entered the close aforesaid, and ate up, trampled down and destroyed a large number of cabbages, to wit, four thousand, then and there being and growing on said close, the property of the plaintiff." The answer denied "each and every allegation in the plaintiff's writ and allegation contained."

At the trial in the Superior Court, before DEWEY, J., it appeared that the defendant, the owner of certain cattle, hired one Hoyt, for an agreed price, to drive them from Watertown to Brighton, by the highway; that Hoyt was to employ and pay for whatever assistance he needed; that Hoyt had also made an agreement with one Brownell to drive certain other cattle for Brownell to the same place; that Hoyt hired two boys and a man to assist him; that Hoyt put the two droves together, and was assisted by the man and the boys; that after going a part of the distance, the cattle broke away from Hoyt and his assistants and ran from the highway, some into the field of one Hooper, and some into the land of one Halleran; that Hooper and Halleran, without being requested to do so by Hoyt or his assistants, drove the cattle from their respective premises; that notwithstanding the efforts of Hoyt and his assistants, some of the cattle thus driven by Hooper and Halleran passed from the land of Halleran into and over the land of the plaintiff, and injured the cabbages thereon; that Hoyt and his man were experienced drivers of cattle; that the defendant was not with the cattle after Hoyt started with them; that after getting the cattle back into the highway, Hoyt and Locke drove them to Brighton. It did not appear that the cattle broke or passed through any fence.

The judge instructed the jury as follows: "If the defendant employed one Hoyt for an agreed price to drive a number of his cattle from Water-

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town to Brighton, and while being driven by Hoyt, and those he employed to assist him, they escaped from the control of Hoyt, and broke and entered the plaintiff's close, and trampled down and destroyed his crops, the defendant is liable therefor. If other cattle than the defendant's broke and entered with his cattle the plaintiff's close, the defendant is liable only for such damages as the jury are satisfied were done by the cattle of the defendant."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. W. Hammond, for defendant.

I. T. Drew & C. H. Chellis, for plaintiff.

DEVENS, J. Inasmuch as the highways have been set apart, among other things, that cattle may be driven thereon, and as, from the nature of such animals, it is impossible, even with care, to keep them upon the highways, unless the adjoining land is properly fenced, it has been settled that the owner of unfenced lands upon such ways cannot seize as damage feasant, or sustain an action for the injury caused by, cattle that wander thereupon, if reasonable care has been used in driving them along the highway, or if they have so escaped, having been properly managed, if reasonable effort has been made to remove them. *Stackpole v. Healy*, 16 Mass. 33, and cases cited; *Lyman v. Gipson*, 18 Pick. 422; *Little v. Lathrop*, 5 Greenl. 356; *Lord v. Wormwood*, 29 Me. 282; *Avery v. Maxwell*, 4 N. H. 36; *Mills v. Stark*, 4 N. H. 512; *Dovaston v. Payne*, 2 H. Bl. 527; *Goodwyn v. Cheveley*, 4 H. & N. 631.

The common law is not altered by Gen. Sts., ch. 25, § 25, which provides that "when any person is injured in his land by sheep, swine, horses, asses, mules, goats or neat cattle, he may recover his damages in an action of tort against the owner of the beasts, or by distraining." This statute is intended to prescribe the remedies to which a party injured is entitled, one of which, that by distraint, involves much detail; but leaves the question whether the facts as proved in a particular case show an injury of such a character as to form the proper subject of legal proceedings, to be determined by the principles of the law as they were then understood.

In the present case, the count of the declaration on which the plaintiff relied was one charging the defendant with so negligently driving the cattle along the public highway near the plaintiff's close, that by reason thereof they broke and entered such close and did the damage complained

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of. But the question whether there was any negligence in the manner in which the cattle were driven along the highway was not put to the jury by the learned judge. He ruled that if, while the cattle were being driven by Hoyt and his assistants, they escaped from his control and broke and entered the plaintiff's close, and trampled and destroyed his crops there growing, the defendant was liable therefor. This instruction apparently assumes that the cattle entered into the land of the plaintiff directly from the highway. As the case finds that they did not pass through any fence, it is erroneous, because it makes the defendant responsible even if the cattle were in all respects properly managed and attended while traveling on the highway, and if having escaped while so managed and attended into the plaintiff's land, every reasonable effort was made to remove them and prevent damage.

On examining the facts, however, as reported in the bill of exceptions, it will be seen that the cattle left the highway and entered first upon the lands of Hooper and Halleran, who drove them out of their respective premises without the request of Hoyt and his assistants, and that, notwithstanding their efforts, some of the cattle thus driven passed over the land of the plaintiff, it not appearing that they passed through any fences, and did damage thereon, which was the injury complained of. Upon this aspect of the evidence the instruction was defective also, and did not call the attention of the jury to the considerations which should have governed the decisions of the case as presented by such a state of facts. Unless there was evidence of negligence in driving the cattle, or in permitting them to remain an unreasonable time, by entering and being upon the unfenced lands of Hooper and Halleran, which were bounded upon the highway, the cattle were not there under such circumstances that any action could have been maintained for their casual trespass. The only right which Hooper and Halleran had in reference to them (having no right under such circumstances to detain them damage feasant) was to drive them back into the road. The case does not present the question whether, the cattle being thus upon the lands of Hooper and Halleran, if they themselves, following their own habits and instincts, had passed from these lands to the land of the plaintiff, the track being also unfenced, an action could have been maintained for the damage there done. The instruction given would, as applied to the facts, permit the plaintiff to recover, even if the cattle were, in the effort to get them off their own lands, wrongfully and negligently driven by Hooper and Halleran upon the land of the plaintiff. It presents the question, therefore, whether, if by the wrongful act of a stranger the cattle of A. are driven upon the

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land of B., the owner of them is liable to B. in an action of tort. It is undoubtedly contemplated by the law that the owner shall be liable for all the damage done by domestic animals, resulting from their habits or from any neglect by those to whom he may intrust them; but where injury proceeds from neither of these causes, but from the wrongful act of a third person, such person alone should be liable.

In this discussion we have treated the defendant as responsible for the conduct of Hoyt, and as the case is to go back for a new trial, it is proper to add that this is in our opinion correct. The word "owner," as used in Gen. Stats., ch. 25, § 25, is intended to include the person in whom is the general property in the animals, while it embraces also those who are in possession of them under a special title or by virtue of any lien, and such general owner must be held responsible even if, at the time of any injury alleged to have been committed by them, they were in the possession of a bailee for the purpose of being driven from one place to another. *Sheridan v. Bean*, 8 Metc. 284.

Exceptions sustained.

HOWLAND v. HOWLAND.

(114 Mass. 517.)

Seduction — action for — evidence.

Evidence that the plaintiff's marriage with his reputed wife was void is, in an action for the seduction of his reputed daughter, admissible on the defendant's part, to rebut a presumption of actual service by showing that the plaintiff was not legally entitled to her services; and in mitigation of damages.

TORT. The declaration was as follows: "And the plaintiff says, that the defendant, on or about the 8th day of April, A. D. 1872, debauched and carnally knew Flora N. Howland, a minor daughter of the plaintiff, between the age of fifteen and sixteen years, and the servant of the plaintiff, whereby the said Flora became pregnant and sick with child for a long space of time, to wit, for the space of nine months following, at the expiration of which time the said Flora was delivered of the child with which she was pregnant as aforesaid. By means of which said several premises the said Flora was, for a long space of time, unable to do and perform her duties as a servant of the plaintiff as aforesaid, and the plaintiff was thereby deprived of her service, and was put to great ex-

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pense on account of her said sickness, to wit, the sum of one hundred dollars, and was occasioned great mental suffering." The answer was a general denial.

At the trial in the Superior Court before ALLEN, J., there was evidence tending to show that Flora N. Howland was delivered of a child, as alleged in the declaration, and that the defendant was its father. The plaintiff testified that she was his minor daughter, and lived at his house. There was no evidence in respect to any service which she rendered the plaintiff. The defendant offered to prove, by competent evidence, that Sarah N. Howland, who was called the wife of the plaintiff, and who was the mother of Flora, was formerly the wife of one Heman B. Ryder, who obtained a divorce from her from the bonds of matrimony, in May, 1847, for her misconduct; that it was about a year after that time when the ceremony of marriage was performed between her and the plaintiff; and that Heman B. Ryder was still alive. He contended that upon proof of these facts the plaintiff could not maintain the action. It appeared in the case that the plaintiff and Sarah N. had lived together as husband and wife since the ceremony of marriage above stated. The court excluded this evidence, and the jury having found a verdict for the plaintiff, the defendant alleged exceptions.

G. Marston, for defendant.

J. M. Day, for plaintiff.

WELLS, J. The evidence offered to show that the marriage of the plaintiff with Sarah N. Howland was illegal and void, tended directly to negative one proposition upon which his action was founded; to wit, that he was legally entitled to the services of Flora N. Howland as his minor daughter. This was not in avoidance, but in direct denial and disproof of a material fact alleged by the plaintiff.

The plaintiff may indeed maintain his action upon proof of actual service, although not the legal parent; and the facts of the case, with the supposed relations between them, might have warranted the jury in inferring that the condition of actual service existed. But that was not the necessary conclusion; and the defendant was deprived of the benefit of evidence which was competent and material upon that issue also, as well as upon the question of the measure of damages.

Exceptions sustained.

Hawes v. Knowles.

HAWES v. KNOWLES.

(114 Mass. 518.)

Damages — in action against master.

If there is wantonness or mischief, causing additional bodily or mental damage, in the injurious act of a servant within the scope of his employment, that wantonness or mischief will enhance the damages as against the master.

TORT for damage caused by the defendant's servant driving against the plaintiff's wagon.

At the trial in the Superior Court, before BRIGHAM, C. J., the plaintiff offered evidence to show that the servant of the defendant, who was driving the defendant's stage-coach at the time of the collision, drove against the wagon of the plaintiff wantonly, as well as carelessly and negligently, and sought to enhance the damages on that account.

The defendant requested the court to instruct the jury that he was not liable for any wanton conduct of his servant, but only from his negligence and want of due care in his service, and that if the fact, as contended for by the plaintiff, was that the servant, when he came in collision with the plaintiff's wagon, acted in such a manner as to wound the feelings of the plaintiff, it would not enhance the damages. The court ruled against the objection of the defendant, that if there was wantonness or mischief in the act of the servant, affecting the plaintiff injuriously in body or mind, that fact would tend to enhance the damages. The jury returned a verdict for the plaintiff for \$202, and the defendant alleged exceptions.

G. Marston, for plaintiff.

G. A. King & H. P. Harriman, for defendant.

GRAY, C. J. A master is responsible for a wrongful act done by his servant in the execution of the authority given by the master, and for the purpose of performing what the master has directed, whether the wrong done be occasioned by the mere negligence of the servant, or by a wanton and reckless purpose to accomplish the master's business in an unlawful manner. *Howe v. Newmarch*, 12 Allen, 49; *Ramsden v. Boston & Albany Railroad Co.*, 104 Mass. 117; S. C., 9 Am. Rep. 200.

In an action of tort for a willful injury to the person, the manner and manifest motive of the wrongful act may be given in evidence as affecting the question of damages, for when the merely physical injury is the same, it may be more aggravated in its effects upon the mind, if it

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is done in wanton disregard of the rights and feelings of the plaintiff, than if it is the result of mere carelessness. *Stowe v. Heywood*, 7 Allen, 118; *Smith v. Holcomb*, 99 Mass. 552.

The evidence introduced at the trial, so far as it is reported in the bill of exceptions, was that the defendant's servant, driving the defendant's coach, drove against the wagon of the plaintiff wantonly, as well as carelessly and negligently. As applied to this evidence, the instruction requested was rightly refused; and the instruction given, fairly construed, was only that if in the act done by the servant in the performance of his master's business, by which the plaintiff was injured, there was wantonness or mischief on the part of the wrong-doer, which caused additional injury to the plaintiff in body or mind, it would tend to enhance the damages. Thus construed, the instruction is unexceptionable.

Exceptions overruled.

DANIELS V. NEWTON.

(114 Mass. 530.)

Action for breach of contract — when it accrues.

An action for the breach of a written agreement to purchase land brought before the expiration of the time given for the purchase, cannot be maintained by proof of an absolute refusal on the defendant's part ever to purchase. (See note, p. 394.)

WELLS, J. This action is for breach of an agreement in writing, under seal, for the purchase of certain land from the plaintiff by the defendants. The time for performance is indicated by two clauses; one that "said premises are to be conveyed within thirty days from this date;" the other that "in case the said parties of the second part should fail to sell their estate at the expiration of the thirty days, then we agree to extend this agreement for thirty days." The inference from the latter clause is that the defendants were to have the whole thirty days for performance on their part, and, in the contingency mentioned, thirty days more. Such was the effect given to the terms of the written instrument, by the ruling at the trial, and we think correctly.

The plaintiff relied upon a supposed breach of the agreement by the defendants within the thirty days; to wit, May 29, the writing being dated May 15, and thereupon had brought his action May 30.

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The ruling of the court upon this point was that if the defendants "fixed a day, within said thirty days, for the performance of said agreement by the respective parties, and the plaintiff was then ready to perform his part, and the defendants then refused absolutely to perform said agreement on their part, then or at any other time, that would be a breach of the agreement on their part for which the plaintiff can maintain this action."

We do not understand this ruling to have been based upon the supposition of an oral agreement in regard to the time of performance varying the terms of the written instrument as an executory contract. It would have been clearly erroneous in that aspect; first, because no such substituted agreement is set forth in the declaration; secondly, because such an oral agreement in regard to land would be within the statute of frauds, and could not be so enforced.

Subsequent oral agreements in regard to the mode and time of performance of written contracts relating to land, and doubtless admissible to affect the question whether the conduct of either party, as proved, constitutes a breach of his written agreement. In that aspect, the evidence adduced by the plaintiff in this case was competent, and might have warranted the jury in finding a breach of the contract by the defendants, if they did not revoke their refusal within the thirty days, even without any further offer to perform on the part of the plaintiff.

The action having been brought immediately upon the refusal, and within the time allowed for performance by the terms of the written contract sued upon, the effect of the ruling was that an absolute refusal of performance, purporting and intended to be a refusal to fulfill the contract at any time, would be of itself a breach of a contract for acts to be done within a time not yet expired, so that an action would lie forthwith. The proposition involved in this ruling, to wit, that there may be a breach of contract, giving a present right of action, before the performance is due by its terms, seems to have been adopted by recent English decisions. *Frost v. Knight*, L. R., 7 Ex. 111 (1872); *Hochster v. De la Tour*, 2 E. & B. 678 (1853).

It is said to be applicable, not only in cases where performance has been rendered impossible by the voluntary conduct of the party, as in agreements for marriage or conveyance of land, by marriage or conveyance to another, and by way of exception to the general rule formerly maintained, but to the full extent of a general rule: so that an absolute and unqualified declaration of a purpose not to fulfill or be held by the contract, made by one party to the other, may be treated as of itself a

present breach of the contract by repudiation, as well before as after the time stipulated for its fulfillment by such party. The point was elaborately discussed in *Frost v. Knight*, by Lord Chief Justice COCKBURN; and the principle evolved is expressed in these propositions, on page 114:

“The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the mean time he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage.”

“The contract having been thus broken by the promisor and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote.”

The first of these two propositions would apply with peculiar force to commercial paper, especially if its repudiation by the maker were made public. We see no reason for a distinction which should exclude it from the same rule that applies to other promises in writing, in respect to what will constitute a breach of the principal contract between the maker and payee. We are not aware, however, that any decision has carried out the rule by applying it to such contracts; and we doubt if the learned jurists who propounded it would have been willing to follow it to that extent.

The doctrine has never been adopted in this Commonwealth, nor has it received any recognition, so far as we are able to learn, beyond that in *Heard v. Bowers*, 23 Pick. 455, 460. The court in that case refer to *Ford v. Tiley*, 6 B. & C. 325, 327, and 5 Vin. Ab. 224; the doctrine announced in *Ford v. Tiley* being, as it appears to us, an erroneous application of the maxims contained in Viner.

A renunciation of the agreement, by declarations or inconsistent conduct, before the time of performance, may give cause for treating it as rescinded, and excuse the other party from making ready for performance on his part, or relieve him from the necessity of offering performance in order to enforce his rights. It may destroy all capacity of the party, so disavowing its obligations, to assert rights under it afterward, if the

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other party has acted upon such disavowal. But we are unable to see how it can, of itself, constitute a present violation of any legal rights of the other party, or confer upon him a present right of action. An executory contract ordinarily confers no title or interest in the subject-matter of the agreement. Until the time arrives when, by the terms of the agreement, he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right, nor loss upon which to found an action. The true rule seems to us to be that in order to charge one in damages for breach of an executory personal contract, the other party must show a refusal or neglect to perform, at a time when and under conditions such that he is or might be entitled to require performance. *Frazier v. Cushman*, 12 Mass. 277; *Pomroy v. Gold*, 2 Metc. 500; *Hapgood v. Shaw*, 105 Mass. 276; *Carpenter v. Holcomb*, id. 280. Such undoubtedly was the interpretation of the common law in all the earlier decisions. *Phillpotts v. Evans*, 5 M. & W. 475; *Ripley v. McClure*, 4 Exch. 345; *Lovelock v. Franklyn*, 8 Q. B. 371.

The case of *Ford v. Tiley*, 6 B. & C. 325, cited in *Heard v. Bowers*, was an action on an agreement of the defendant that he would, as soon as he should become possessed of a certain public house, execute a lease thereof to the plaintiff for a term of years from December 21, 1825. There was in fact an outstanding lease of the premises to another, to expire at midsummer, 1827. Before that term expired, the defendant joined with the trustees, who held the legal title, in a lease to another party for twenty-three years. It was held to be a breach of his agreement with the plaintiff, for which an action would lie at once; because the defendant had given up his right to have the possession, and put it out of his power so long as his own lease for twenty-three years should last. It does not appear that the suit was brought before December 21, 1825; nor that the time when the defendant would become possessed was mentioned in the agreement. It was not the case of an agreement to make a lease at a named future day. The outstanding lease was an extrinsic fact, merely affecting the occurrence of the contingency upon which the performance of the agreement depended; it had no other force in the contract. When, therefore, the defendant made a lease to a stranger, he could no longer say that he was prevented from becoming possessed by the outstanding previous lease, because he had put it out of his power to come into possession, if that were surrendered or otherwise terminated. The plaintiffs' right to have a lease presently was subject only to a contingency, of which the defendant had no longer the ability to avail himself. The judgment accords with the rule we have indicated. But in giving judg-

ment, BAYLEY, J., citing 1 Rol. Ab. 248; 5 Vin. Ab. 225; 21 Edw. IV 55, and Co. Litt. 221b, proceeds to say: "Now if the feoffment of a stranger before the day be a breach of a condition to enfeoff J. S. at a given day, the granting of a lease to a stranger before the day will be a breach of a contract to grant a lease to J. S. at a given day, and *a fortiori* will it be a breach so long as the lease to such stranger remains in force."

It seems to us, however, that the reasoning from conditions of forfeiture or defeasance to executory contracts is illogical. If one, having an estate on condition, by his own act in dealing with the estate puts it out of his power to perform or comply with the condition, he does what is inconsistent with the terms upon which alone he has the estate; and his grantor may re-enter, even before the time of stipulated performance, not because of a new right acquired by the terms of the agreement, but because the right of the other party having become forfeited or extinguished by his breach of the condition, or violation of the terms of his tenancy, the grantor or feoffor is restored to his former estate and right. It is by virtue of that right or title that he enters, the other party being no longer able to avail himself of his conditional estate or right. The analogy holds good if the plaintiff's right to require performance of the agreement awaits only a contingency which the defendant removes by making it impossible, which was the real case in *Ford v. Tiley*. It gives no support to the very different proposition that, in a contract to be performed on a given day, the voluntary disability of one party will entitle the other to require performance, or to have an action for non-performance, before that day arrives.

The distinction is recognized by the authorities referred to by Mr. Justice BAYLEY. Lord COKE says: "And herein a diversity is to be observed between a disability for the time on the part of the feoffor." In the one case, albeit "a certain day be limited, yet the feoffee being once disabled is ever disabled." "And the reason of the diversity is, for that, as Littleton saith, *maintenant* by the disability of the feoffee, the condition is broken, and the feoffor may enter, but so it is not by the disability of the feoffor, or his heirs; for if they perform the condition within the time, it is sufficient, for that they may at any time perform the condition before the day." Co. Litt. 221b; 5 Vin. Ab. 224, Condition, B. c.

We have examined with care the opinions of Lord Chief Justice COCKBURN in *Frost v. Knight*, and of Lord CAMPBELL in *Hochster v. De la Tour*, and we are not convinced that the conclusions at which they arrive are founded in sound principles of jurisprudence, or sustained by the authorities cited in their support.

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Frost v. Knight was an action upon a promise to marry the plaintiff on the death of the defendant's father. The defendant broke off the engagement by announcing his intention not to fulfill his promise. The action was brought without waiting for the death of the defendant's father. The plaintiff having recovered a verdict, judgment was arrested by the Court of Exchequer; but on error it was held, in the Exchequer Chamber, that she was entitled to retain the verdict. The Lord Chief Justice cites *Lovelock v. Franklyn*, 8 Q. B. 371, and *Short v. Stone*, id. 358, as having "established that where a party bound to the performance of a contract at a future time puts it out of his own power to fulfill it, an action will at once lie. Neither decision cited establishes that proposition, where a definite time for performance is appointed by the terms of the contract; but only where the plaintiff was entitled to require performance upon some previous act or request which the conduct of the defendant has dispensed with.

Short v. Stone was upon a promise to marry the plaintiff "within a reasonable time after request." The defendant married another, and this was alleged as the breach. It was held that request was not necessary, and need not be alleged. It was rendered unavailing, and therefore unnecessary, by the act of the defendant, which was of itself a breach of the contract by rendering performance impossible. No question arose, or could arise, whether the action was premature, because there was no future time certain for performance. The defendant had made the only limit of time impossible.

Lovelock v. Franklyn was upon an agreement to assign a lease, at any time within seven years, upon payment of a sum named. The decision is explicitly upon the ground that the option as to the time, within the seven years, was with the plaintiff. "The defendant is to be ready throughout." COLERIDGE, J., p. 375. DENMAN, C. J., says: "Here the party puts it out of his power to perform what he has agreed to perform; that is, to assign at any time at which he may be called upon. This distinction shows that the passage cited from Lord COKE is inapplicable; that proves no more, on the point now before us, than that if an act is to be performed at a future time specified, the contract is not broken by something which may merely prevent the performance in the mean time. We are introducing no novelty. In all the cases put for the defendants, the party had the means of rehabilitating himself before the time of performance arrived; here he has incapacitated himself at the very time when he may be called on and should be ready." PATTERSON, J., says: "In this particular contract, the defendant has undertaken to keep himself ready for the whole time." So far from being sustained

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by this case, the proposition, to which it is cited by Lord Chief Justice COCKBURN, is most carefully excluded, if not expressly disavowed.

The proposition, even if established, is not decisive of the case now before us. We have discussed it, however, because it has an important bearing upon the argument, and is essential to the result reached in *Frost v. Knight*. The Lord Chief Justice, taking it as established by the cases cited, proceeds to the next step. He says, "The case of *Hochster v. De la Tour*, upheld in this court in the *Danube & Black Sea Co. v. Xenos*, 13 C. B. (N. S.), 825, went further, and established that notice of an intended breach of a contract to be performed *in futuro* had a like effect."

Hochster v. De la Tour appears to us to be the only case which sustains this position as an adjudication, although that decision has been recognized in several subsequent cases. *Avery v. Bowden*, 5 E. & B. 714; 6 id. 952; *Wilkinson v. Verity*, L. R., 6 C. P. 206. It was an action upon a contract of hiring to go as courier for the plaintiff from June 1, 1852, at monthly wages. There was notice of renunciation of the employment; and the action brought May 22, 1852, was sustained. Lord CAMPBELL says: "But it cannot be laid down as a universal rule that, where by agreement an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act has arrived. If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage." *Short v. Stone*, 8 Q. B. 358. The statement we have already made of *Short v. Stone* will show how the essential fact in that case is mistaken, and the reason of the decision misapplied. He adds: "If a man contracts to execute a lease on and from a future day for a certain term, and, before that day, executes a lease to another for the same term, he may be immediately sued for breaking the contract." *Ford v. Tiley*, 6 B. & C. 325. We have already shown in what manner *Ford v. Tiley* fails to sustain the position for which it is cited.

In *Bowdell v. Parsons*, 10 East, 359, cited by Lord CAMPBELL, as showing that upon a contract of sale and delivery of goods at a future time, an action "might have been brought before that time as soon as the vendor had sold and delivered to another," the only question was of the necessity of alleging time and place of request to deliver; the plaintiff being entitled to delivery on request.

In *Planchè v. Colburn*, 8 Bing. 14, also cited, no time was specified. The plaintiff would have been entitled to his compensation upon performance of the service he undertook, which was the preparation of an

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article or work for the defendant's periodical publication within a reasonable time. He had begun the work toward performance on his part. Full performance by him was rendered useless, and practically prevented by the defendant's abandonment of the enterprise. The case in reality establishes nothing more than that the plaintiff was entitled to treat the contract as rescinded, and recover for what he had done upon a *quantum meruit*.

Elderton v. Emmens, 4 C. B. 479; 6 id. 160, and 4 H. L. Cas. 624, was upon a contract of employment. The plaintiff had entered upon the service and was dismissed. The case recognizes a right of action, founded upon the defendant's obligation to continue the plaintiff in his service, and a breach of that obligation by wrongfully dismissing him. From the opinions of MARTIN, B., 4 H. L. Cas. 648, and of TALFOURD, J., p. 652, it would appear that the action was not brought until after the term of stipulated service had expired. But we conceive that it would have afforded no support to the doctrine for which it was cited, if it had been brought immediately upon the dismissal of the plaintiff; because that was the time for performance of the defendant's agreement to employ the plaintiff, for breach of which the action was brought.

The *Danube & Black Sea Co. v. Xenos*, 13 C. B. (N. S.), 825, by which *Hochster v. De la Tour* is said to have been upheld, was an action upon an agreement by which the plaintiff was to receive and carry freight for the defendant, the shipment to commence on August 1st, and the action was not brought until after August 1st. The only question was whether a repudiation of the agreement, notified to the plaintiff before August 1st, and not recalled, excused the plaintiff from making an offer to perform on that day, and was sufficient to show a breach of the agreement. The judgment is in accordance with that in *Ripley v. M'Clure*, 4 Exch. 345, and with the plain rule of law that when the plaintiff is prevented by the defendant from performing the service or doing the act which will entitle him to the fruits of his contract, he is thereby excused from performance on his part, and is entitled to an appropriate remedy by action. *Scot v. Mainy*, Poph. 109; *Goodman v. Pocock*, 15 Q. B. 576; *Cort v. Ambergate, etc., Railway Co.*, 17 id. 126.

But the question, in what mode and at what time that remedy may be sought, must depend upon the provisions of his contract, and the nature of the rights to which it entitles him, and which are affected by the conduct of the other party. Throughout the whole discussion, both in *Hochster v. De la Tour* and *Frost v. Knight*, the question as to what conduct of the defendant will relieve the plaintiff from the necessity of

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showing readiness and an offer to perform at the day, in order to make out a breach by the other, appears to us to be confounded with that of the plaintiff's cause of action ; or rather, the question, in what consists the plaintiff's cause of action, is lost sight of ; the court dealing only with the conduct of the defendant in repudiating the obligations of his contract.

Much argument is expended in both cases upon the ground of convenience and mutual advantage to the parties from the rule sought to be established. But before that argument can properly have weight, the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case. The legal remedy must be founded on some present legal right, and must conform to the nature of that right. Until the plaintiff has either suffered loss or wrong in respect of that which has already vested in him in right, or has been deprived of or prevented from acquiring that which he is entitled to have or demand, he has no ground on which to seek a remedy by way of reparation. The conduct of the defendant is no wrong to the plaintiff until it actually invades some right of his. Actual injury and not anticipated injury is the ground of legal recovery. The plaintiff's rights are invaded by repudiation of the contract only when it produces the effect of non-performance, or prevents him from entering upon or completing performance on his part, at a time when and in the manner in which he is entitled to perform it or to have it performed.

That this is the natural and ordinary rule seems to be recognized by Lord CAMPBELL, when he declares that "it cannot be laid down as a universal rule," and proceeds to point out exceptions. And Lord Chief Justice COCKBURN concedes it to be true "that there can be no actual breach of a contract by reason of non-performance, so long as the time for performance has not yet arrived." L. R., 7 Ex. 114. But preceding "inchoate right" is discovered, and a corresponding obligation implied, upon which there may be held to be "a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it."

In *Hochster v. De la Tour*, Lord CAMPBELL assigns, as one reason for the decision, that in case of employment as courier, and of promise to marry, a relation is established between the parties by the contract, even before the time of performance ; "they impliedly promise that in the mean time neither will do any thing to the prejudice of the other inconsistent with that relation ;" and "it seems to be a breach of an implied contract if either of them renounces the engagement." In *Frost v. Knight*, the lord chief justice remarks of the promise to marry : "On such a contract being entered into, not only does a right to its completion arise

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with reference to domestic relations and possibly pecuniary advantages, as also to the social status accruing on marriage, but a new status, that of betrothment, at once arises between the parties." "Each becomes bound to the other; neither can, consistently with such a relation, enter into a similar engagement with another person; each has an implied right to have this relation continued till the contract is finally accomplished by marriage."

These, however, are considerations which touch the interpretation and effect of the particular kind of contract; and so far as they tend to sustain the decisions upon the ground of implied obligations arising and requiring observance at once upon entering into the relation by means of such a contract, they also tend to remove the decisions themselves out of the range of the question we are now discussing. If there be sound reason to deduce from a promise to marry, or to employ in a special capacity, at a future time, present obligations of implied contract, upon which an action may be founded, in which the breach of the entire agreement "by reason of the future non-performance" will be "virtually involved." "as one of the consequences of the repudiation of the contract," it surely is not sound reasoning by means of that process to arrive at the conclusion that all contracts, having a future day for their performance, include like rights and obligations, so as to enable one party to sue at once, as for a breach, whenever the other announces beforehand his purpose of future non-fulfillment. If this is the result, as it appears to be, of the English decisions referred to, or of the reasoning in those cases, we cannot accede to it. We have no occasion now to determine what may be the rule, where the contract may fairly be interpreted as establishing between the parties a present relation of mutual obligations, because we are of opinion that no such implied obligations can be engrafted upon the contract in the present case. It simply binds the defendants to receive a deed of real estate and pay or secure the purchase-money; and its written provisions, by which alone their obligations are to be ascertained, allow them thirty days at least within which to fulfill their agreement. The plaintiff could require nothing of them until the expiration of that time; and no conduct on their part or declaration, whether of promise or denial, could give him any cause of action in respect of that agreement of sale. This action therefore cannot be maintained.

Exceptions sustained.

L. S. Dabney, for defendant.

W. Colburn, for plaintiff.

Moody v. Blake.

NOTE.—See *Burtis v. Thompson*, 1 Am. Rep. 516 ; *Holloway v. Griffith*, 7 id. 208 ; *Dugan v. Anderson*, 11 id. 509, wherein a doctrine contrary to that announced in the foregoing case was held.

In *Howard v. Daly*, 61 N. Y. 362 (*ante*, p. 285), DWIGHT, C., discussed the question at length and reached the conclusion that an action would lie for a refusal to perform a contract before the day of performance arrived ; but the case was decided upon another ground, and the court did not express its opinion upon the point under consideration. See also *Crist v. Armour*, 34 Barb. 368.—REP.

MOODY V. BLAKE.

(117 Mass. 23.)

Sale induced by fraud — conversion by innocent purchaser.

A., falsely representing himself to be a member of a firm, bought, in the name of the firm, goods from B., who sent them by a carrier to the firm. On the refusal of the firm to receive them, A. sold them to C., to whom they were delivered by the carrier at A.'s request. Held, that A. had no title to the goods, and that an action for their conversion would lie by B., against C., although the latter was a purchaser in good faith.

TORT for the conversion of 200 bedsteads. The facts were briefly these : one Porter came to plaintiff's place of business in Bethel, Maine, and presenting to plaintiff a business card of H. S. Hills & Co. of Boston, represented that his name was A. C. Pool, a member of said firm, and that he desired to purchase some bedsteads for the firm. He ordered 200 bedsteads to be sent by carrier to said firm of Hills & Co. at their place of business, and plaintiff sent them. Upon arrival of the goods and notice to Hills & Co., they refused to receive them on the ground that they had not ordered them. Thereupon said Porter went to Hills & Co., said he had some bedsteads to sell, and asked if they wanted them. They replied "no," but gave him the names of defendant and others as persons who might desire them. He applied to defendant and referred him to Hills & Co., who informed defendant that they had before purchased the same kind of bedsteads of Porter, that these had been sent to them but that they did not want so many, and that they supposed Porter had charge of them to sell. Thereupon defendant bought them of Porter and paid him for them, and Porter ordered the carrier to deliver them to defendant, which was done. Plaintiff on learning the facts demanded the bedsteads of defendant, but he refused to give them up.

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The defendant asked the judge to rule: "1. That if the goods were sold with the intention to pass the property, although it was brought about by a fraudulent device, then the defendant would not be liable, if he bought them in good faith; 2. That the plaintiff had constituted Porter his agent, and so the defendant was not liable; 3. That the plaintiff had constituted H. S. Hills & Co. his agent, to a certain extent, sufficient to authorize the defendant to purchase and hold these goods, if it was done with their knowledge and agreement."

The judge refused all these prayers as asked for; but, upon the question embraced in the first request, instructed the jury that if the goods were sold with the intention to pass the property to A. C. Pool individually, and not to the firm of H. S. Hills & Co., the defendant would not be liable, if he bought in good faith. As to the questions involved in the other prayer, the judge left it to the jury to determine whether the plaintiff had made Porter or H. S. Hills & Co. his agents, giving them full instructions upon these and other questions in the case, not excepted to, except so far as the judge declined to give the instructions asked for. The jury found for the plaintiff, and the defendant alleged exceptions.

L. M. Child, for defendant.

C. W. Turner, for plaintiff.

AMES, J. It is well settled that where a vendor is induced by fraudulent representations to deliver property to a dishonest or irresponsible purchaser, yet, if that purchaser transfers it for a valuable consideration to a third person having no notice of the fraud, and acting in good faith, such third person will hold the property in preference to the original seller. *Hoffman v. Noble*, 6 Metc. 68; *Rowley v. Bigelow*, 12 Pick. 307. But the present case does not fall within this rule. The plaintiff never sold these goods to Porter, and made no contract with him. He supposed himself to be dealing only with Hills & Co. He never delivered the goods to Porter, and never consented to their going into his possession. When Hills & Co. refused to receive them, they remained in the hands of the carrier, but were the property and constructively in the possession of the plaintiff. The only mode in which Porter could get them into his hands was by the false pretense that he had authority from the owner to dispose of them. This was a wrongful conversion of them to his own use, by which he could acquire no title, and for that reason it

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was not in his power to give any title to the defendant, although the latter may have acted in entire good faith. It appears that as soon as the plaintiff discovered (in the language of the bill of exceptions) that he had been "swindled," he demanded the restoration of the goods. The case therefore falls within the rule laid down in *Stanley v. Gaylord*, 1 Cush. 536; *Gilmore v. Newton*, 9 Allen, 171; *Bearce v. Bowker*, 115 Mass. 129.

The first ruling requested by the defendant was therefore properly refused, and that which was given upon the question embraced in that request was sufficiently favorable to the defendant. With regard to the other requests, the court left it to the jury to determine as to the alleged agency, with full instructions, not excepted to, on the general subject. This was all that the defendant was entitled to ask. We see no ground on which the court could have ruled, as matter of law upon the evidence reported, that the plaintiff had constituted Porter his agent, or that he had given to Hills & Co. the limited authority indicated in the defendant's third request. All this matter was left to the jury, with proper instructions.

Exceptions overruled.

 CONNOLLY V. CITY OF BOSTON.

(117 Mass. 64.)

Sunday — travel on — necessity or charity.

One who works by night instead of by day, and who travels on the Lord's day for the purpose of seeing his master and inducing him to change his hours of labor from the night to the daytime, in order that he may sleep better, is not traveling from necessity or charity, and cannot maintain an action against a town for an injury sustained by him, while so traveling, by reason of a defect in a highway which the town is by law obliged to keep in repair. (*See note, p. 397.*)

TORT for personal injuries sustained by reason of a defective highway. Trial in the Superior Court, before BACON, J., who allowed a bill of exception in substance as follows:

At the trial, the counsel for the plaintiff, in opening his case, stated that the plaintiff claimed damages for personal injuries received while passing over Dover street, in Boston, at nine o'clock, Sunday night, October 6, 1872, on account of a defect in the highway; that the defect consisted in the draw of the bridge being swung off,

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remaining so for more than twenty-four hours previous to the accident, without any guard or barrier; and that the plaintiff, using due care, was walking along the highway, and for want of the required barriers, walked overboard and received severe and permanent injuries.

The plaintiff then testified as follows: "I was going from South Boston to Way street, Sunday night, about nine o'clock, October 6, 1872. I was going to my boss to see if I could get a chance to work by day. I was working by night. I was going to work Monday night. I was seeing if I could get day work. I had been shoveling in Cambridge. I wanted to work by day instead of by night, because I could sleep better. It was on account of my sleep that I wanted to work by day."

The case was then stopped by the judge, who ruled that, inasmuch as the plaintiff was passing over the highway on Sunday night, and not for any work of necessity or charity, he could not recover; to which ruling the plaintiff alleged exceptions.

A. A. Ranney & W. E. L. Dillaway, for plaintiff.

C. F. Kittredge, for defendant.

GRAY, C. J. The plaintiff's own testimony showed that he was traveling on the Lord's day on a matter of his own secular business, and not from the pressure of any "necessity" upon himself, or "charity" toward any other person, upon any possible interpretation of those words. He cannot therefore maintain this action. Gen. Stats. ch. 84, § 2; *Bosworth v. Swansey*, 10 Metc. 364; *Jones v. Andover*, 10 Allen, 18; *Stanton v. Metropolitan Railroad*, 14 Allen, 485; *Commonwealth v. Sampson*, 97 Mass. 407; *Commonwealth v. Josselyn*, id. 411.

Exceptions overruled.

NOTE.—In *Gorman v. Lowell*, 117 Mass. 65, a woman, who worked in a mill in one town and temporarily boarded there, went on Saturday to see her children in an adjoining town. One of them being sick, she remained until Sunday night, when she went to the town where she worked to procure medicine for the sick child, intending to send it home by another person, and on her way was injured by a defect in a highway. It was held, in an opinion which simply announced the conclusion, that the jury would be warranted in finding that she was traveling from necessity or charity. See also *Johnson v. Irasburg*, ante, p. 111, and *Doyle v. Lynn, etc.*, B. R., post.—REP.

Faber v. Hovey.

FABER v. HOVEY.

(117 Mass. 107.)

Action on judgment rendered in another State — when appeal no bar.

If, by the law of a State where a judgment is obtained, an appeal does not stay proceedings on the judgment in that State, the pendency of such an appeal is no bar to an action on the judgment in this Commonwealth.

CONTRACT on a judgment of the Supreme Court of the county and State of New York. The case was submitted to the Superior Court, and to this court on appeal, upon an agreed statement of facts in substance as follows :

A judgment was recovered in the State of New York, at the time and for the amount alleged, by the plaintiff against these defendants. An appeal was duly taken, under the laws of New York, from said judgment to the General Term of the Supreme Court of that State, and the said appeal was there pending at the commencement of this action, and is still there pending. By the laws of New York, upon an appeal being taken from a judgment, such appeal does not stay the proceedings or the execution of the judgment, unless a written undertaking be executed on the part of the appellant, by at least two sureties, to the effect that if the judgment appealed from, or any part thereof, be affirmed, the appellant will pay such judgment and all costs and damages which shall be awarded against the appellant upon the appeal. In this case, no security was given by the defendants, or either of them, as is required by the laws of New York, to stay proceedings in the suit, or upon the judgment, upon such appeal being taken, or to prevent the issuing of an execution upon the judgment; and their property, and the property of either of them, in the State of New York, is liable to be taken upon an execution issued upon such judgment, in order to satisfy the same, their said appeal and its due prosecution and pendency to the contrary notwithstanding. And by the laws of the State of New York, upon reversal or modification by the appellate court of the judgment aforesaid, such court may make order for the restitution of money paid, or property and rights, if any, lost by reason of the judgment so reversed or modified.

If upon the above facts the plaintiff is entitled to judgment in this action, in this court, then judgment is to be entered for him according to his declaration, for the amount of said judgment, with interest thereon from the date of the rendition thereof to the date of judgment in this court, with costs; otherwise, for the defendants.

On the foregoing facts the Superior Court ordered judgment for the plaintiff, and the defendants appealed to this court.

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P. Thacher, for plaintiff.

B. F. Jacobs, for defendants.

GRAY, C. J. The Constitution of the United States declares that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and empowers Congress by general laws to prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof. Const. U. S., art. 4, § 1. Congress, in the exercise of the power thus conferred, has provided that the records and judicial proceedings of the courts of any State, authenticated as therein prescribed, "shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the States from whence the said records are or shall be taken." U. S. Stat. 1790, ch. 38. The judgment of a court of another State, having jurisdiction of the cause and the parties, must therefore be allowed the same effect in the courts of this Commonwealth as it would have in the State in which it was rendered. *Carleton v. Bickford*, 13 Gray, 591; *Thompson v. Whitman*, 18 Wall. 457,* and cases cited; *Knowles v. Gas-light & Coke Co.*, 19 Wall. 58.

The case stated shows that by the law of New York an appeal does not vacate the judgment appealed from, or stay execution, unless the appellant gives security to pay the judgment, with costs and damages, if it is affirmed; and corresponds, in this respect, rather to a writ of error or review, than to an appeal, under our practice. It follows that the judgment recovered by the plaintiff against the defendants is in full force, notwithstanding the appeal, and that the plaintiff is entitled to maintain this action thereon. And so are all the authorities: *Seeley v. Pritchard*, before NELSON, J., cited in 28 Conn. 442; *Suydam v. Hoyt*, 1 Dutch. 230; *Merchants' Ins. Co. v. De Wolf*, 33 Penn. St. 45; *Bank of North America v. Wheeler*, 28 Conn. 433; *Nill v. Omparet*, 16 Ind. 107; *Cherry v. Speight*, 28 Tex. 503; *Rogers v. Hatch*, 8 Nev. 35.

Judgment for the plaintiff.

* S. C., 11 Am. Rep. 435, note.

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LE FOREST v. 'TOLMAN.

(117 Mass. 100.)

Tort — for injuries occasioned out of the State.

Defendant's dog, owned and kept in Massachusetts, strayed into an adjoining State and bit plaintiff. In an action of tort in Massachusetts for the injury, there was no evidence that the statute of such adjoining State made the injury actionable, nor was it proved that the defendant had knowledge that his dog was accustomed to bite mankind and therefore liable at common law. *Held*, that the action would not lie, although the statute of Massachusetts gives an action for such injuries within the State.

TORT, under the Gen. Stats., ch. 88, § 59, to recover double the amount of the damage sustained from the bite of a dog.

At the trial in the Superior Court, before ALDRICH, J., it appeared that the plaintiff was bitten and injured by the defendant's dog at Pelham, in the State of New Hampshire, where the plaintiff lived with his father and mother; that the defendant was a resident of Dracut, in this Commonwealth, and had a place of business in Lowell, and kept his dog at Dracut and at his place of business in Lowell; that the day the injuries complained of were done, the defendant's dog strayed away from his owner into New Hampshire, and was seen several times in the neighborhood of the plaintiff's residence; that the next day the plaintiff's father received the dog and carried him to the defendant at his place of business in Lowell. Upon this state of facts, the defendant asked the judge to rule that the action could not be maintained, which the judge declined to do. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

C. A. F. Swan, for defendant.

G. Stevens & W. H. Anderson, for plaintiff.

GRAY, C. J. In order to maintain an action of tort, founded upon an injury to person or property, and not upon a breach of contract, the act which is the cause of the injury and the foundation of the action must at least be actionable or punishable by the law of the place in which it is done, if not also by the law of the place in which redress is sought. *Smith v. Condry*, 1 How. 28; S. C., 17 Pet. 20; *The Ohina*, 7 Wall. 53, 64; *Blad's case*, 3 Swanst. 603; *Blad v. Bamfield*, id. 604; *General Steam Navigation Co. v. Guillou*, 11 M. & W. 877; *Phillips v. Eyre*, L. R., 4 Q. B. 225, 239, and L. R., 6 Q. B. 1; *The Halley*, L. R., 2 Adm. 3, and L. R., 2 P. C. 193; *Wood v. Wood*, 1 Blackf. 71; *Wall v. Hoskins*,

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5 Ired. 177 ; *Mahler v. Norwich & New York Transportation Co.*, 35 N. Y. 352 ; *Needham v. Grand Trunk Railway*, 38 Vt. 295 ; *Richardson v. New York Central Railroad*, 98 Mass. 85.

In the case at bar, the injury sued for was done to the plaintiff in New Hampshire by a dog owned and kept by the defendant in Massachusetts. Such an action could not be maintained at common law, without proof that the defendant knew that his dog was accustomed to attack and bite mankind. *Popplewell v. Pierce*, 10 Cush. 509 ; *Pressey v. Wirth*, 3 Allen, 191. No evidence of such knowledge, or of the law of New Hampshire, was introduced at the trial. Nor is it contended that the defendant would be liable to any action or indictment by the laws of that State.

The plaintiff relies upon the statute of this Commonwealth, which provides that "every owner or keeper of a dog shall forfeit to any person injured by it double the amount of the damage sustained by him, to be recovered in an action of tort." Gen. Stats., ch. 88, § 59. This statute is not a penal, but a remedial statute, giving all the damages to the person injured. *Mitchell v. Clapp*, 12 Cush. 278. It does not declare the owning or keeping of a dog to be unlawful, but that if the dog injures another person, the owner or keeper shall be liable, without regard to the question whether he had or had not a license to keep the dog. The wrong done to the person injured consists not in the act of the master in owning or keeping, or neglecting to restrain, the dog, but in the act of the dog for which the master is responsible.

The defendant having done no wrongful act in this Commonwealth, and the injury for which the plaintiff seeks to recover damages having taken place in New Hampshire, and not being the subject of action or indictment by the laws of that State, this action cannot be maintained.

Exceptions sustained.

COMMONWEALTH V. STURTIVANT.

(117 Mass. 122.)

Evidence — in criminal trial — opinions of non-experts — blood-stains.

Common observers, having special opportunity for observation, may testify to their opinions as conclusions of fact, although they are not experts, if the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time, and the facts upon which the witness is

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called to express his opinion are such as men in general are capable of comprehending and understanding.

Whether a witness, not an expert, is qualified to express his opinion as a conclusion of fact, is to be decided by the judge presiding at the trial ; and his finding is not open to revision in this court, unless, upon a report of all the evidence, it is shown to be without foundation, or is based on some erroneous application of legal principles.

On the trial of an indictment for murder, a witness familiar with blood, who had examined, with a lens, a blood-stain on a coat, when it was fresh, and who testified to its appearance at the time he examined it, and that it was not in the same condition at the trial, was permitted to testify that its appearance when he examined it indicated the direction from which it came, and that it came from below upward, although he had never experimented with blood or other fluid in this respect. *Held*, that the admission of the testimony afforded no ground of exception.

At the trial of an indictment for murder, a witness who, soon after the homicide, had taken a pair of shoes from the defendant's house, one of which, as the government contended, fitted a track supposed to have been made by the murderer, was permitted to testify that the shoes appeared as if they had recently been washed. *Held*, that the admission of this testimony afforded no ground of exception. (*See note, p. 410.*)

INDICTMENT for the murder of Simeon Sturtivant, at Halifax, in the county of Plymouth, on February 15, 1874. Trial before WELLS and AMES, JJ., who allowed a bill of exceptions in substance as follows :

There was evidence tending to show that Simeon Sturtivant and Mary Buckley, his housekeeper, were last seen alive about half-past six o'clock on Sunday evening, February 15, 1874, and that Thomas Sturtivant was last seen alive about half-past seven o'clock on the morning of the 16th, Mary Buckley was found lying dead in a field about thirty-five rods from the dwelling-house of the Sturtivants, and soon afterward the dead body of Thomas was found in one room of the house, and that of Simeon in another room ; that between these rooms was another large room, all the doors of which were closed. The only evidence tending to show who was the murderer of either of these persons was circumstantial.

A chemist having stated that he was accustomed to make chemical and microscopic examination of blood and blood-stains, for the purpose of determining whether they were human blood or the blood of other animals, was admitted as a witness for the government, and testified in regard to the tests which he had applied to certain stains upon articles of clothing belonging to the defendant. He was then asked to give an opinion as to the direction from which a certain stain upon the defendant's overcoat had come. The defendant's counsel objected, contending that the limit to which the witness could go was a full description of the stain as it appeared under the microscope or otherwise and illustrations before the jury (which the witness made). The objection was overruled, and the witness stated that the blood came from below upward.

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It was not shown that he had made or witnessed any experiments with blood or other fluids in regard to this matter. The examination of the witness and the rulings of the court upon that point was as follows :

Qu. " I wish to inquire what the stains upon the coat would indicate as to the direction from which the blood came ? " The defendant's counsel objected that this was not chemistry or any other branch of science.

WELLS, J. " Is the coat in the same condition now as then in that respect ? Did it show any thing then that it does not show now ? "

Ans. " It did. The natural rubbing from being handled has removed a portion. It could only be noticed, also, by the use of a lens. "

Qu. " The natural rubbing of the coat has partially obliterated the blood ? "

Ans. " It has obliterated a portion of it ; it can't be seen as distinctly. "

WELLS, J. " I think your first inquiry would be, whether there was any thing discovered that indicated any thing of that sort. "

Qu. " At the time you made your first examination, was there any thing discoverable that indicated the direction from which the stains had come that you found upon the coat ? "

Ans. " Yes, sir. "

Qu. " What ? "

Ans. " The appearance of the stains. "

Qu. " Will you tell us what direction they had come from ? "

Defendant's counsel. " So far as the stains are concerned that are upon the coat, the jury can judge as well as he can. "

WELLS, J. " I think the witness can describe what it was that he saw that indicated the direction, and show what it was, rather than to give a general opinion as to what the direction was. "

Defendant's counsel. " I wish to reserve an exception, so far as the stains that are now upon the coat are concerned, and which the witness says are the same now that they were then, excepting the change resulting from the natural handling of the coat. "

WELLS, J. " I understand, also, that he says that there were indications then that are not apparent now ; that he examined it with a lens, and that that aided his examination. It is in that view that he is allowed to describe what the indications were which indicated the direction. "

Defendant's counsel. " What is not there now, we do not object to the witness describing ; but so far as any thing now visible, indicating in which direction the blood came, is concerned, we object to that. We think the distinction should be observed by the witness ; and unless

your Honors are of a different opinion, we ask that he may be confined to that."

WELLS, J. "We think he may give the whole description, as it was found."

Ans. "It is an oval stain between one-eighth and one-fourth of an inch long, and one inch from the edge of the coat, on the right hand side, front, and three and three-fourths inches below the last button-hole, the bottom button-hole. The direction of the stain is diagonal. Using my own coat as an illustration, the stain lay in this direction (illustrating). The upper portion of the stain contained more blood than the lower, which it does not contain now, on account of its having been rubbed off."

Qu. "What does that indicate as to the direction?"

Defendant's counsel. "One moment. If it is chemistry, we do not object; if it is any thing else, we do."

WELLS, J. "I think if the witness explains the reasons at the same time that he gives the result, he may do so."

Ans. "If the force of a stream of fluid, whatever it may be, and especially blood, be from below upward, the heaviest portion of the drop will stop at the further end of the stain; if from above downward, it will stop below."

Defendant's counsel. "That is pure opinion as to matter of mechanics, not chemistry. Any butcher is just as good an expert on that as this witness."

WELLS, J. "The evidence is admitted subject to exception."

Ans. "It can only be seen with a lens in a small stain."

Qu. "Now, you have described one, the direction of which was upward and diagonal. Is there any other?"

Ans. "Not upon the coat."

A pair of shoes was taken from the defendant's house on the second day after the homicides, one of which, as the government contended, fitted a track supposed to have been made by the retreating murderer. No blood-stains were found upon the shoes. The witness who took them testified, under objection, that they appeared as if they had been wet, and partly, not quite dried, still moist a little; should say they had been quite wet. The witness also stated that they looked as if they had been washed. The witness had been familiar with the cutting of leather and the making of shoes, and had worked at the business some fifteen years before, from the age of thirteen until he was twenty-one. The defendant did not object to testimony as to the condition of the shoes in respect to dampness, etc., but objected to the officer giving an opinion as to the

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condition in which the shoes had been before he saw them. It was in evidence that the prisoner denied having recently worn the shoes. The Attorney-General argued to the jury that this statement was false, and that the shoes had been washed to remove the mud.

The jury returned a verdict of guilty of murder in the first degree; and the defendant alleged exceptions.

B. W. Harris, for defendant.

C. R. Train, Attorney-General (*W. G. Colburn*, Assistant Attorney General, with him), for the Commonwealth.

ENDICOTT, J. (after deciding an unimportant exception.) The principal exception is to the competency of the evidence in regard to the blood-stain. The question here is whether a witness, who is familiar with blood and has examined, with a lens, a blood-stain upon a coat, when it was fresh, can also testify that the appearance then indicated the direction from which it came, and that it came from below upward, although he has never experimented with blood or other fluid in this respect. The witness had previously testified to its appearance at the time he examined it, and to the fact that at the trial it was not in the same condition, some of the blood having been rubbed off.

The exception to the general rule that witnesses cannot give opinions is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill or learning; but includes the evidence of common observers, testifying to the results of their observation made at the time in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury. Such evidence has been said to be competent from necessity, on the same ground as the testimony of experts, as the only method of proving certain facts essential to the proper administration of justice. Nor is it a mere opinion which is thus given by a witness, but a conclusion of fact to which his judgment, observation and common knowledge has led him in regard to a subject-matter which requires no special learning or experiment, but which is within the knowledge of men in general.

Every person is competent to express an opinion on a question of identity as applied to persons, things, animals or handwriting, and may give his judgment in regard to the size, color, weight of objects, and may estimate time and distances. He may state his opinion in regard to sounds, their character, from what they proceed, and the direction from which they seem to come. *State v. Shinborn*, 46 N. H.

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497. The correspondence between boots and footprints is a matter requiring no peculiar knowledge, and to which any person can testify.

Commonwealth v. Pope, 103 Mass. 440. So a person not an expert may give his opinion whether certain hairs are human hairs. *Commonwealth v. Dorsey*, 103 Mass. 412. And a witness may state what he understood by certain "expressions, gestures and intonations," and to whom they were applied; otherwise the jury could not fully understand their meaning. *Leonard v. Allen*, 11 Cush. 241.

In this connection may be noticed a large class of cases, where, from certain appearances more or less difficult to describe in words, witnesses have been permitted to state their conclusions in relation to indications of disease or health, and the condition or qualities of animals or persons. As, when a witness testifies that a horse's foot appeared to be diseased, he states a matter of fact, open to the observation of common men. *Willis v. Quimby*, 31 N. H. 485. And it is proper for a witness to give his opinion that a horse appeared to be sulky and not frightened at the time of an accident. *Whittier v. Franklin*, 46 N. H. 23; or he may testify as to the qualities and appearance of a horse. *State v. Avery*, 44 N. H. 392. In *Currier v. Boston & Maine Railroad*, 34 N. H. 498, it is said that the question whether there was hard pan in an excavation does not ask for an opinion, but seeks for facts within the knowledge of the witness, and of which the knowledge may be obtained by common observation. It is competent for a witness to testify to the condition of health of a person, and that he is ill or disabled, or has a fever, or is destitute and in need of relief. *Parker v. Boston & Hingham Steamboat Co.* 109 Mass. 449; *Wilkinson v. Moseley*, 30 Ala. 562; *Barker v. Coleman*, 35 id. 221; *Autauga County v. Davis*, 32 id. 703; and one may testify that another acted as if she felt very sad. *Culver v. Dwight*, 6 Gray, 444. So those who have observed the relations and conduct of two persons to each other may testify whether, in their opinion, one was attached to the other. And in *M'Kee v. Nelson*, 4 Cow. 355, the court say: "The opinion of witnesses on this subject must be derived from a series of instances passing under their observation which yet they never could detail to a jury." See *Trelawney v. Colman*, 2 Stark. 191. A witness may also give his judgment whether a person was intoxicated at a given time. *People v. Eastwood*, 4 Kern. 562; or whether he noticed any change in the intelligence or understanding, or any want of coherence in the remarks of another. *Barker v. Comins*, 110 Mass. 477; *Nash v. Hunt*, 116 id. 237.

In *Steamboat Clipper v. Logan*, 18 Ohio, 375, it was held that a person who had been a captain and engineer of a steamboat, having

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examined a boat after injury by collision, may state his opinion as to the direction from which the boat was struck at the time of the collision. There was no evidence that the witness had any special knowledge in regard to collisions, through observation or experiment; and the court does not rest the decision on the ground that the witness was an expert; but says there is "no objection to calling these men experts, if the name will render their testimony more unexceptionable; but it is not true as a legal proposition that no one but an expert can give an opinion to a jury. From the necessity of the case, testimony must occasionally be a compound of fact and opinion." And the court say that they can give no better illustration of their meaning than by the use of the language in *M'Kee v. Nelson*, a portion of which is quoted above.

Where, immediately after the collision of two boats, a person looked at their condition, he was permitted to testify to the impression made upon his mind as to the position in which they came together. *Patrick v. The John Q. Adams*, 19 Mo. 73.

It would seem to be within the knowledge of men in general, when looking at the effects of a blow upon a solid body, to determine from the external marks and indications, if any exist, the direction from which it came. In the great majority of cases, these indications are distinct and plain, and to observe them is within the constant experience of men. Take the case of a heavy body striking on the ground. A falling shot or fragment of rock leaves a very different mark, according as it strikes the ground vertically or at an angle; and if at an angle, the general direction from which it came would be apparent to the common eye. In like manner, a contusion on an upright surface might plainly indicate the direction of the blow. Suppose the panel of a carriage door is broken in by a collision; different appearances would follow from a horizontal blow delivered at right angles, than from a blow from the front or rear, from above or below. Such appearances the common observer can detect, some more accurately and clearly than others, but it is presumed to be within the power of all; and the opinion of an expert, who has experimented by blows on similar surfaces, and is learned in the law of forces, is not necessary or required. If the panel itself is introduced to the jury, they are competent and able to decide the question. If it cannot be, the witness who saw it may describe, as well as he can, what he saw, and state the conclusion he formed at the time.

It would also seem to be within the range of common knowledge to observe and understand those appearances, in marks or stains caused by blood or other fluids, which indicate the direction from which they came, if impelled by force.

No one would question the fact that water passing over the surface of ground may and does, according to its force, leave clear and decisive indications of the direction of its passage. The dry bed of a mountain torrent, or the track of a freshet, clearly indicates the direction of the stream. And it is the same when propelled artificially by force, as from an engine. When the force is not great enough to disturb or displace the surface of the soil, the direction may be clearly discernible, when fresh, by the character of the marks, stains or moisture it leaves upon the ground. These may not all easily be described in words, but may convey a distinct and decided impression to the mind at the time.

A bucket of water thrown upon the ground, particularly if thrown with force, would leave indications of the direction from which it came, evident to the most casual observer. These would be more apparent if it congealed upon falling, and so became fixed and easily traced. So if a drop or small body of water or other fluid is thrown with force against a perpendicular surface, as against the side of a building, or against clothing upon the person in an upright position, indications of its direction would appear. Whether it is thrown fairly against the surface, or from above or below, or diagonally, it is common knowledge that it will leave different marks or traces of its progress and direction. These marks will be the more easily discerned if made by a fluid thicker than water, and will remain longer and be more conspicuous if it is such as to leave a stain, or if the surface is rough or uneven, so as to retard it or check it in its course.

There is no question of science or learning necessarily involved in the understanding of these indications; if visible, they are easily understood. The only question is, were the common indications visible, from which direction may be inferred. It may be difficult in a given case to distinguish them without the most careful observation; but if seen by the witness, they may be testified to. It may also be more difficult to detect them on an upright surface, but that goes to the degree or weight of the evidence, not to its competency. *Fryer v. Gathercole*, 4 Exch. 262.

Blood is a fluid which coagulates and stiffens rapidly when exposed to the air, and might therefore more decidedly give indications of its direction. If such indications do appear, there would seem to be no objection that a witness acquainted with the peculiar properties of blood, as the common mind is acquainted with more familiar fluids, should testify to them without having actually seen or made experiments in regard to it.

The cases which have been cited are limited to those instances where common observers, having special opportunity for observation, but not

experts having special learning, have been permitted to testify to their opinions, as conclusions of fact.

The competency of this evidence rests upon two necessary conditions : first, that the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time ; and second, that the facts upon which the witness is called to express his opinion, are such as men in general are capable of comprehending and understanding.

When these conditions have been complied with or fulfilled in a given case, the court must then pass upon the question, whether the witness had the opportunity and means of inquiry, and was careful and intelligent in his observation and examination. It is not the mere qualification of the witness but the extent and thoroughness of his examination into the specific facts to which the inquiry relates, and the general character of those facts, as affording to one, having his opportunity to judge, the requisite means to form an opinion.

The same rule applies to this class of testimony as to the testimony of experts, whether the expert is competent by his study or business, and whether he has qualified himself to testify, or had proper opportunity to examine, are preliminary questions for the court. So when witnesses to the value of land or property or handwriting are called, to which all men may testify, if they have information on the subject-matter of inquiry, their qualification to give an opinion must be first decided by the court at the trial. In all these cases the element of fact is involved to be decided by the court, upon which the capacity to testify depends. And the decision at the trial, like all decisions of this character, is final and conclusive, unless upon a report of all the evidence it is shown to be without foundation, or is based on some erroneous application of legal principles. *Nunes v. Perry*, 113 Mass. 274, and cases cited ; *Commonwealth v. Coe*, 115 id. 481 ; *Swan v. Middlesex*, 101 id. 173, 177.

In the case at bar the admission of the evidence by the court involved the decision : (1) that the stain was not in the same condition, and did not exhibit the same appearance at the trial as it did when examined by the witness, and cannot be reproduced to the jury : upon this as a matter of fact there is no question ; (2) that the stain might in itself furnish indications from what direction it came, capable of being observed by a witness, who, though familiar with blood and its qualities, had not made or seen experiments made with it or other fluids in this respect ; and (3) that the witness had made that thorough, careful and intelligent observation of the appearances, which would entitle him to testify. We must take the decision of the court on this last point to be conclusive.

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Whether the reasons the witness gave for his opinion of the direction of the stain were sound or unsound does not affect the question of competency, and of course the defendant had full opportunity to test him by cross-examination, or to show by evidence or argument that his reasons were unsound.

We cannot say that such a witness, familiar with blood, its properties and appearance, with his opportunity to examine and the actual examination made by him, might not form and testify to a reliable opinion as to the direction in which the blood moved in making the elongated stain, although he had never made actual experiments of that kind; and we see no ground for sustaining this exception to the admission of the evidence.

For the same reasons the testimony in regard to the shoes taken from the defendant's house soon after the homicide, was competent. The witness stated the result of his observation, made at the time, of appearances that could not be reproduced or accurately described in words to the jury; and his testimony related to a subject-matter within the common observation and experience of men.

[The other exceptions considered were unimportant.]

Exceptions overruled.

NOTE.—The question as to the admissibility in evidence of the opinion of a non-expert is elaborately examined in 1 Greenl. Ev. (13th ed.), § 440, and notes; and see, also, 2 Best on Ev., § 517 (Wood's ed.), and an elaborate note thereto by Mr. Wood; Roscoe's Crim. Ev. (7th ed.), 143; Starkie on Ev. (10th Am. ed.), 95, and notes.

Although, as a general rule, a witness cannot be asked what his opinion upon a particular question is, since he is called to speak as to facts only; yet, where questions of science, skill or trade, or other like questions are involved, persons specially trained or having peculiar knowledge thereon may be examined as to their opinions; so facts which are latent in themselves and only discoverable by way of appearances, more or less symptomatic of the existence of the main fact, may, from their very nature, be shown by the opinions of witnesses as to the existence of such appearances or symptoms. Thus opinions have been admitted as to the comparative health of a person. *State v. Knapp*, 45 N. H. 148; *Parker v. Steamboat Co.*, 109 Mass. 449; but see *Ashland v. Marlborough*, 99 id. 47; but not unless the witness has had an opportunity for observation. *Tompkins v. Wadley*, 3 T. & C. 424. The statement in the head-note to *Higbie v. The Guardian Mut. Ins. Co.*, 53 N. Y. 603, that a non-expert could give evidence as to whether one appeared to be sick or well seems not to be justified by the case. So opinions of non-experts have been admitted as to whether certain hairs were human, *Conn v. Dorsey*, 103 Mass. 412; that one person appeared to be sincerely attached to another, *McKee v. Nelson*, 4 Cow. 355; as to the degree of affection entertained by a wife for her husband, in an action of crim. con., *Trelawney v. Coleman*, 2 Stark. 191; as to whether another was intoxicated, *People v. Eastwood*, 14 N. Y. 562; as to whether a person's conduct on a certain occasion was offensive and insulting, *Raisler v. Springer* 40 Miss. 352; as to the quality of a horse, *State v. Avery*, 44 N. H. 382; that the plain-

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tiff "seemed satisfied" with a business arrangement proposed to him by the witness, *Bradley v. S. F. M. Co.*, 30 N. H. 487; that a horse "appeared to be well and free from disease," *Spear v. Richardson*, 34 N. H. 428; that a carriage, not seen by the witness appeared from the sound to start from a certain point, *State v. Shireborn*, 46 N. H. 497; that a person "seemed to suffer and seemed weak and debilitated," *Taylor v. Railroad*, 48 N. H. 304; that a person had the appearance of a man whose system was weak and debilitated, *Barker v. Coleman*, 35 Ala. 221; as to one's pecuniary responsibility, *Bank of Middlesex v. Rutland*, 33 Vt. 414; as to times and distances, *Campbell v. State*, 23 Ala. 44; and as to the rate of speed of a railroad train upon a certain occasion, *Detroit, etc. v. Van Steinburg*, 17 Mich. 99.

So evidence is admissible of opinion as to resemblance of foot-tracks: *Hotchkiss v. Germania Ins. Co.*, 5 Hun, 90; that a root or vegetable is dead, *Stone v. Frost*, 6 La. 440; as to the age of a person who pleads infancy where the witness had an opportunity to observe the appearance of the person when the contract was made, *Benson v. McFadden*, 50 Ind. 431; but the mere opinion of a witness with regard to the age of a person from his appearance, unaccompanied by the facts on which that opinion is founded, is not admissible, *Morse v. State*, 6 Conn. 9; as to the credibility of another witness, *Hamilton v. People*, 29 Mich. 173; as to whether the noisome odors arising from a pig sty would render an adjoining residence uncomfortable, *Kearney v. Farrell*, 28 Conn. 317; a practical surveyor may express his opinion as to whether marks on trees and piles of stones were intended as monuments of boundaries, *Davis v. Mason*, 4 Pick. 156; so all persons who have acquired a knowledge of the breeds of horses from raising, dealing in and taking care of horses are competent to testify as to the breed of a particular horse with which they are acquainted, *Harris v. Panama R. R. Co.*, 58 N. Y. 660; as to the opinions of non-experts on the question of sanity or mental capacity, see *Pidcock v. Potter*, 8 Am. Rep. 181, and note; *State v. Pike*, 6 id. 533, and the elaborate dissenting opinion of DOE, J., which has been since followed as the law by the same court, overruling *State v. Pike*, in *Hurby v. Merrill*, 56 N. H. 227; *Hawlett v. Wood*, 55 N. Y. 634. In this latter case it was held that persons not expert, after testifying to facts and incidents in relation to a testator, tending to show mental capacity, may testify to the impression produced upon them thereby, and also whether the acts and declarations testified to seemed to them rational or not, but that they could not testify as to the general soundness or unsoundness of the testator's mind, citing *People v. O'Brien*, 36 N. Y. 276; *People v. Reel*, 42 id. 270; see, also, *Sisson v. Conger*, 1 T. & C. 564.

Opinions of the value of property may be given by a person familiar with such property, *Brown v. Haburger*, 52 Barb. 15. But a witness cannot testify as to value until he has been shown competent to speak upon the subject, *Bank v. Mudgett*, 44 N. Y. 514; *Bedell v. Long Island R. R. Co.*, 44 N. Y. 367; *Swan v. Middlesex County*, 101 Mass. 172; *Snyder v. Western Union R. R. Co.*, 25 Wis. 60; *Brackett v. Edgerton*, 14 Minn. 174. Witnesses may testify as to the market value of cattle derived from the newspapers, *Cleveland R. R. Co. v. Perkins*, 17 Mich. 296; the value of a living animal as a stallion may be proved by witnesses to his reputation, *Millan v. Davis*, 66 N. C. 539; farmers living in the vicinity of certain lands may testify as to their value, *Robertson v. Knapp*, 35 N. Y. 91; but not persons who are neither farmers nor dealers in land, and who have no knowledge as to the value except from hearsay, *Whitney v. Boston*, 98 Mass. 312; so experts may give their opinions as to the value of dogs, the opinions being based either on actual sales or their general observations and experience, *Cantling v. The Hannibal R. R. Co.*, 54 Mo. 385; S. C., 14 Am. Rep. 476. That actual observation and experience will qualify one to speak as an expert as to value was also held in *Clark v. Baird*, 9 N. Y. 183; *Brill v. Flagler*, 23 Wend. 355. The degree of skill or knowledge which a witness must have to testify as an expert rests largely in the discretion of the court. *State v. Ward*, 39 Vt. 255; *Howard v. Providence*, 6 R. I. 514. One cannot testify as to the value of services unless he has received such services or has personal knowledge thereon, *Lamerere v. Caryl*, 4 Den. 370; *Scot v. Littienthal*, 9 Bosw. 224; so an opin-

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ion as to the value of services "under the circumstances" is not admissible, *Lewis v. Trickey*, 20 Barb. 387; nor are opinions as to the value of services when the value or price is fixed by statute as brokerage services, *Perine v. Hotchkiss*, 58 Barb. 77. Nor is a non-professional person's opinion of the value of legal services competent, *Smith v. Kobbe*, 59 Barb. 289.

The opinions of witness as to the amount of damages sustained by a party is not admissible, *Teerpening v. Corn Exch. Ins. Co.*, 43 N. Y. 279; *Giles v. O'Toole*, 4 Barb. 261; *Dunham v. Simmons*, 3 Hill, 609. But where the facts upon which a calculation of damages is made are not within the cognizance of the jury a witness may express his opinion after giving the facts upon which it is based. See *Nellis v. McCarn*, 35 Barb. 115; *Harpendig v. Shoemaker*, 37 Barb. 270; but see *Armstrong v. Smith*, 44 id. 120.

On questions of the identity of persons or things, handwriting, distances, time and a multitude of other matters the opinions of witnesses are received from necessity, because no better evidence can be had. Any witness, not an expert, who knows the facts, personally, may give an opinion in a matter requiring skill, stating also the facts upon which he bases his opinion. *Indianapolis v. Kuffer*, 30 Ind. 235; *Alabama R. R. Co. v. Burkett*, 42 Ala. 83. But the opinion of one not an expert, or ignorant of anatomy, is not admissible as to the sex of a person from an examination of the skeleton, *Wilson v. State*, 41 Tex. 320; nor that a child resembles or does not resemble his alleged father, *Kenniston v. Rowe*, 16 Me. 38; nor as to the mere understanding of one of the parties to a contract as to its effect, *Murray v. Bethune*, 1 Wend. 191; or as to what one understood another to say he would do, *Rich v. Jackway*, 18 Barb. 357; *Crownse v. Fitch*, 23 How. Pr. 350; nor as to the manner in which a witness understood a libel, *Van Vechten v. Hopkins*, 5 Johns. 211; *Gibson v. Williams*, 4 Wend. 320; nor that certain articles were "necessaries," *Whitmarsh v. Angle*, 3 Code R. 53; and see *Merritt v. Seaman*, 6 N. Y. 168.

Opinion of a matter within common experience is not evidence, *Gavish v. Pacific R. R. Co.*, 49 Mo. 274; *Cannell v. Phoenix Ins. Co.*, 59 Me. 582; *Messner v. People*, 45 N. Y. 1; *McCombs v. N. C. R. R. Co.*, 67 N. C. 193. So opinions upon a state of facts equally apparent to the jury are not admissible, *Allen v. Stout*, 51 N. Y. 668.—REP.

WIGHT V. SPRINGFIELD & NEW LONDON RAILROAD COMPANY.

(117 Mass. 226.)

Corporation — who may be director

Unless required by statute it is not necessary that a director in a corporation be a stockholder. A person who is not a stockholder in a railroad corporation, but is duly appointed by a city, pursuant to statute, to represent it at the meetings of the stockholders of the railroad corporation and to vote on the stock which it owns therein, may be elected a director of the corporation.

PETITION for a writ of *mandamus* to compel the respondent to admit the petitioner to act as one of its directors, to which office the petitioner alleged he had been duly elected. The answer averred that the petitioner was not a stockholder in or a member of the corporation, and was therefore not eligible to the office of director thereof. The

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case was reserved by ENDICOTT, J., for the consideration of the full court, upon the petition and answer, and a report in substance as follows:

The petitioner is a citizen of Springfield, and has been since January 1, 1875, the mayor of that city. The respondent corporation was established under the Stat. of 1872, ch. 53. The city of Springfield, after due proceedings, had, under the Stat. of 1874, ch. 251, subscribed to the articles of association, and for fifteen hundred shares of the capital stock, which was fixed at two thousand shares of one hundred dollars each.

The petitioner was one of five persons appointed to represent the city at the meetings of the corporation, and vote on its stock. The first meeting of the corporation, after its certificate was obtained, was held January 27, 1875, at which the corporation voted that the number of directors should be thirteen, and proceeded to elect directors. The whole number of shares voting was one thousand eight hundred and thirty-five, and the petitioner received fifteen hundred and two votes, being a large majority of the whole number. He was not in his individual capacity, nor otherwise than as appears herein, an owner of stock in the corporation, and the presiding officer at the meeting refused to declare him elected, and the corporation has ever since, by its officers, refused to recognize him as a director, or permit him to act as such. There were one hundred subscribers to the articles of association and stockholders in the corporation, thirteen of whom were named in the articles of association, before the vote of the city to subscribe to the articles was passed, to act as a board of directors, till others should be chosen by the corporation. Five other citizens of Springfield, not stockholders in the corporation, received a majority of the votes cast for directors, and the corporation has refused and still refuses to recognize them as directors, or permit them to act as such.

If the petition can be maintained, the peremptory writ to issue; if not, the petition to be dismissed.

A. L. Smule, for petitioner.

G. M. Stearns & M. P. Knowlton, for respondent.

GRAY, C. J. Although the directors of a railroad corporation are usually chosen by the stockholders from their own number, there is no rule of law that makes the holding of stock an indispensable qualification of a director, unless prescribed by some act of the Legislature or by-law of the corporation. The only adjudication upon the subject, cited at the

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argument, supports this view. *State v. McDaniel*, 22 Ohio St. 354. And the statutes expressly requiring directors of banks and insurance companies to be members of the corporation, and the first directors of a railroad corporation incorporated under the general law to be associates, strengthens the conclusion that the Legislature intended to leave the qualifications of directors in the permanent organization of such a corporation to the determination of the stockholders. Gen. Stats., ch. 57, § 41; ch. 58, §§ 27, 43; Stat. 1872, ch. 53, § 4; *Sargent v. Webster*, 13 Metc. 497, 504.

The remarks of the court in *Penobscot Railroad v. Dummer*, 40 Me. 172, 174, and in *Spering's Appeal*, 71 Penn. St. 1, 21; S. C., 10 Am. Rep. 684, 689, on which the respondent relies, do not appear to have been necessary to the decisions, and the reports do not show what the statutes were under which the cases arose.

The Stat. of 1874, ch. 251, authorizing towns and cities to subscribe for and hold stock in railroad corporations, by § 2 authorized any town or city to become an associate for the formation of a railroad corporation in compliance with the general railroad act of 1872, ch. 53, "with all the powers and privileges enjoyed by any individual associate," and in § 5 provided that "the selectmen of towns, and such persons as may be authorized by vote of the city council of cities, may, at all meetings of the corporations in which the stock or securities are held, represent their respective municipalities, and vote upon each and every share of stock owned by them respectively."

Under the authority conferred by this statute, the city of Springfield has become the owner of three-fourths of the capital stock of the Springfield and New London Railroad Company. It would be a most unreasonable construction of the statute to limit the choice of the city in the election of directors to the holders of the remaining fourth part of the stock.

For these reasons, we are of opinion that the petitioner has been duly elected a director of the respondent corporation, and that a

Peremptory writ of mandamus must issue.

Colburn v. Morrill.

COLBURN V. MORRILL.

(117 Mass. 262.)

Landlord and tenant — eviction from part of premises bars action for rent.

Eviction of a tenant, by a landlord, from a part of the leased premises, suspends the entire rent so long as the eviction continues ; and the effect is the same whether the lease be oral or written.*

CONTRACT for rent. Plaintiff's evidence tended to show an oral lease on February 6, 1868, of three rooms, in Lawrence, to defendant, at \$10 per month ; that defendant occupied the rooms till October 7, 1868, when he left, owing plaintiff five months' rent. The defendant offered to prove that the lease included an attic room ; that during the term of the lease plaintiff removed defendant's goods out of said attic room, and locked the door of that and one of the other rooms, and forbade defendant to enter them ; and that plaintiff kept said rooms locked until defendant left, September 6, 1868.

The defendant's counsel contended that these facts, if proved, would amount to an eviction of the defendant from a portion of the leased premises, and that an eviction from a part of the leased premises would suspend the whole rent, until such time as the plaintiff should lawfully terminate his tenancy in the premises ; that the defendant's tenancy in the premises never having been terminated, he was rightfully in possession of the same on the day he left under his original contract of hiring, and that an eviction from a portion of the leased premises would suspend the rent during the whole time claimed in the plaintiff's writ.

The judge ruled that, if all the facts set forth in the defendant's opening, and such inferences as might be legally drawn from them, were true, they would constitute no defense to the plaintiff's suit. The jury found for the plaintiff for the full amount of his claim, and the defendant alleged exceptions.

J. C. Sanborn, for defendant.

W. S. Knox, for plaintiff.

ENDICOTT, J. The evidence of the plaintiff tended to prove that he made an oral lease of three rooms to the defendant for an entire rent. The defendant offered to prove that in addition to the three rooms he

* See note, 17 Am. Rep. 62.

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also hired an attic room. As the case is presented it is immaterial whether the attic room was included in the agreement, as both parties agree that the front room, from which the defendant says he was evicted, was part of the premises let to the defendant. There was evidence offered by the defendant from which the jury might have found that he was evicted from the front room, which was part of the premises, and from the attic room, which he contends was also a part of the same.

It was long since settled in England that the eviction of a tenant by a landlord from a part of the demised premises suspends the entire rent so long as the eviction continues. *Salmon v. Smith*, 1 Saund. 204, n. 2; *Morrison v. Chadwick*, 7 C. B. 266, 283; *Upton v. Townend*, 17 id. 30. The question was left open in *Shumway v. Collins*, 6 Gray, 227; and in *Fuller v. Ruby*, 10 id. 285, the court declined to express an opinion on the point, it not being properly before them. But in *Leishman v. White*, 1 Allen, 489, it was held that a tenant evicted by a landlord from part of the demised premises was not liable for rent or for use and occupation of the residue. The landlord cannot "so apportion his own wrong as to enforce the lessee to pay any thing for the residue." *Hodgkins v. Robson*, 1 Vent. 276, 277; *Royce v. Guggenheim*, 106 Mass. 201; S. C., 8 Am. Rep. 322; *Christopher v. Austin*, 11 N. Y. 216. The fact that a tenant has no written lease does not affect his rights in this respect.

We are of opinion, therefore, that the learned judge should have submitted the case to the jury upon the question whether the defendant was evicted by the plaintiff from a portion of the premises which he occupied under his agreement.

- *Exceptions sustained.*

AMORY V. KANNOFFSKY.

(117 Mass. 351.)

Landlord and tenant — surrender of lease by operation of law.

The general agent of the owner of real estate leased it to defendant by a lease under seal; defendant sub-let it to M., and the agent thereupon agreed to look to M. for the rent and to accept a surrender of defendant's lease; defendant gave him the lease and took a receipt therefor. *Held*, in an action against defendant for the rent, (1) that the agent had an implied power to accept a surrender; and (2) that the facts amounted to a surrender by operation of law.

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CONTRACT to recover rent reserved in a lease under seal from the plaintiff to the defendant, and signed by John L. Roberts and the defendant. Trial in the Superior Court, before BACON, J., who allowed a bill of exceptions in substance as follows :

The plaintiff proved the lease whereby it appeared that the rent was payable monthly in advance, on the sixth day of every month, and this action was brought to recover the installments due on October 6, and November 6, 1872, the lease having at the latter date two years more to run. John L. Roberts, who signed the lease, was at the time the general agent of the plaintiff in the management of his buildings, but had no written authority to execute the lease.

The defense relied on was a surrender of the lease and the acceptance of the same by Roberts. The defendant offered in evidence the record of an action under the Gen. Stats., ch. 137, brought by the plaintiff against Michael G. Minon, to recover possession of the premises described in the lease. The writ in that action was dated November 9, 1872. The judge ruled, against the plaintiff's objection, that the bringing of that action was a bar to the recovery from this defendant of rent for the month from November 6, to December 6, it appearing that that action was not for forcible entry or detainer by Minon.

The defendant further offered evidence tending to show that in May, 1872, he had sub-let the premises to Minon ; that Minon for that month and for every month after paid rent directly to Roberts, and no demand for it was made on the defendant, and that for May, when both Minon and the defendant paid rent, Roberts repaid to the defendant the amount paid by him ; that the defendant told Roberts that if he received rent from Minon, he must release him from liability under his lease ; that Roberts thereupon told the defendant that he should continue to receive rent from Minon, and that he might give up his lease ; and that afterward the defendant took his lease to Roberts' office and delivered it to Francis R. Roberts, who gave him a receipt therefor. Francis R. Roberts was the brother of John L. Roberts, but there was no evidence that he had any authority to act for him or for the plaintiff in the matter of giving or annulling leases. John L. Roberts knew that the lease had been left at his office, and he never returned it to the defendant. There was no evidence of any authority in John L. Roberts to accept a surrender of a lease on behalf of the plaintiff other than the general verbal authority already mentioned.

The plaintiff requested the judge to rule that Roberts could not, without written authority, accept a surrender, and that the above facts, if proved, did not constitute a surrender by operation of law ; but the

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judge refused so to rule, and instructed the jury, that if they found the facts were testified to by the defendant's witnesses, as above stated, to be true, those facts would constitute a surrender, and that their verdict must be for the defendant. The jury found for the defendant, and the plaintiff alleged exceptions.

J. C. Gray, Jr. & R. Gray, for plaintiff.

G. M. Hobbs, for defendant.

ENDICOTT, J. It appears by the bill of exceptions that John L. Roberts was the general agent of the plaintiff in the management of his real estate. Under this agency he executed the lease in question and received the rent, though he had no written authority. That he was authorized to do this under his general agency must be taken for granted from the fact that this action is brought upon the covenants of the lease for such installments of rent as are not paid. In the absence of some restriction upon the admitted general agency of Roberts to manage the real estate, as he was doing by executing leases and receiving rent, his substitution of a new tenant, and his agreement with the defendant that the lease should be surrendered, must be presumed to have been within his general agency. These are the incidents of a general agency, and necessary for its complete execution. Nor was the actual surrender of the lease less binding because there is no direct evidence that Francis R. Roberts had authority to receive the lease from the defendant and give his receipt for the same. John L. Roberts knew it had been left at his office, did not return it, and continued to receive the rent from Minon in pursuance of the agreement for surrender made with the defendant. The question of the surrender of the lease is therefore to be considered as if made with the plaintiff himself.

The facts relied upon by the defendant to establish a surrender are as follows: In May, 1872, he underlet the premises to Minon, and for that month both he and Minon paid rent to Roberts. The defendant then told Roberts that if he received rent from Minon, he must release him from liability under the lease. Roberts said he should continue to take the rent from Minon, and that the defendant could give up his lease, and thereupon refunded the rent for May paid by the defendant. The defendant then took the lease to Roberts' office, and received the receipt as above stated. The rent was paid to Roberts by Minon until October following, and in November the plaintiff brought an action

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under the Gen. Stats., ch. 137, against Minon, to recover possession. No further demand was made upon the defendant for rent until this action was brought. The presiding judge instructed the jury that if they found these facts to be true, there was a surrender of the lease and the defendant was entitled to a verdict. We are of opinion that the ruling was correct, and that the defendant's estate in the premises was surrendered by operation of law within the meaning of the statute. Gen. Stats., ch. 89, § 2.

The facts bring this case within the rule, that where, by the agreement between the lessor and lessee, the lessee abandons his possession and the lessor resumes possession of the premises, there is a surrender by operation of law. The defendant gave up his lease, the plaintiff took Minon as his tenant. The relations of the parties were thus changed. Minon was no longer liable to the defendant, but became liable to the plaintiff. The estate thus created in Minon is inconsistent with the rights of the defendant under his lease. The plaintiff, on the other hand, by receiving the lease back and agreeing to the new relation between himself and Minon, and establishing a tenancy as to him, which he is precluded from denying, has done acts inconsistent with a claim for rent under his lease to the defendant.

The authorities in this Commonwealth and in England sustain this doctrine. In *Randall v. Rich*, 11 Mass. 494, it was held that a lease was determined by the surrender of the key, its receipt by the lessor, and the subsequent letting of the house during the term to another tenant, although, by the statute, surrenders, like other contracts respecting real estate, must be in writing.

In *Talbot v. Whipple*, 14 Allen, 177, where the tenant left the premises with a manifest design of accepting the abandonment, it was said that the minds of the parties concurred in the common intent of relinquishing the relation of landlord and tenant, and executed this mutual intent by acts tantamount to a stipulation to put an end to the lease.

The leading case in England on this subject is *Thomas v. Cook*, 2 B. & Ald. 119. In that case the tenant underlet the premises, and the landlord with the assent of the tenant accepted the new tenant. The new tenant being in arrear, the landlord distrained on his goods, and it was held that these circumstances constituted a surrender of the interest of the original tenant by operation of law. The court put the decision on the ground that the plaintiff had, with the assent of the defendant, accepted the new tenant, as his tenant of the premises.

In *Grimman v. Legge*, 8 B. & C. 324, the tenant notified the landlord that he should quit, the latter said he might do so. The tenant removed

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his furniture, delivered his keys, which were accepted ; and the lease was held to be terminated.

In *Dodd v. Acklom*, 6 Man. & Gr. 672, the delivery back of the keys, and their acceptance by the lessor, was held to be a surrender by operation of law, and *Thomas v. Cook* is expressly relied upon as authority.

In *Walker v. Richardson*, 2 M. & W. 882, A, having made a lease to B, before its expiration granted another lease to C. No surrender in writing of B's lease was shown, but his lease, with the seals torn off, was produced from A's custody. It being proved that it was the custom to send old leases to A's office before a renewal was made, and the release was thereupon canceled by A's officer, it was held that there was evidence of B's assent to the lease to C, so as to determine his interest by operation of law. Baron PARKE, in delivering his opinion, said, "Before the case of *Thomas v. Cook* I should have had some difficulty on this point, but that is a recognized case, where the assent of the former tenant that another shall hold in his place was held to constitute as valid a surrender of the first interest by act and operation of law, as if the former tenancy had been determined in writing."

In *Lyon v. Reed*, 13 M. & W. 285, some doubt is thrown by Baron PARKE upon *Thomas v. Cook*, and the reasoning upon which it rests, and it is said the doctrine is not to be extended. The very learned opinion of Baron PARKE in that case is relied upon by the plaintiff in support of his position that there was no surrender of this lease. But in *Lyon v. Reed* there was no change in the possession of the land, and in the later English cases the decision is commented on and *Thomas v. Cook* followed.

In *Nickells v. Atherstone*, 10 Q. B. 944, it was held to be a surrender by operation of law, where a tenant, having left the premises, on application for rent, wrote to the lessor that he could lease to any one else, and the lessor did so and put the new tenant in possession. Lord DENMAN, in delivering the judgment of the court, said that he entirely concurred with the decision of *Lyon v. Reed*, there being no change in the possession, but could not assent to the observations in the opinion upon the line of cases from *Thomas v. Cook* downward.

The remarks of Lord DENMAN were cited with approval in *Davison v. Gent*, 1 H. & N. 744, and the court say that *Thomas v. Cook* is not to be disturbed, and it must be taken as established that, where a lessee assents to a lease being granted to another, and gives up his own possession to the new lessee, that is a surrender by operation of law. In that case the lessor granted a new lease to a stranger with the assent of the tenant who gave up his possession.

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In a later case, *Phené v. Popplewell*, 12 C. B. (N. S.) 334, an agreement by landlord and tenant that the term should be put an end to, executed by the tenant's quitting and the landlord taking possession, by unequivocal acts, of the premises, was held to amount to a surrender.

Upon this review of the authorities, we are of opinion that the facts in this case show a surrender of the lease, and the ruling of the court below was correct.

It is not necessary to consider whether the action brought by the plaintiff against Minon to recover possession of the premises is a bar to the recovery of rent from this defendant, as ruled by the presiding judge; for the reason that the case was submitted to the jury upon the facts relating to the surrender testified to by the witnesses. The record of that action was clearly competent as evidence upon the issue, whether there had been a surrender and Minon had been substituted for the defendant as the tenant of the plaintiff.

Exceptions overruled.

BARTLETT V. BOSTON GAS-LIGHT COMPANY.

(117 Mass. 533.)

Action — escape of gas through negligence of makers — injury to property.

The owner of a house cannot maintain an action against a gas-light company for an injury to his reversionary interest, caused by the negligence of the company in permitting gas to escape into the house, if the immediate cause of the injury was the explosion of the gas by the negligence of a tenant in possession of the house.

TORT for injuries to the plaintiff's reversionary interest and estate in a house on Columbus avenue, Boston, caused by an explosion of gas. At the trial in the Superior Court before BACON, J., the following facts appeared:

At the time of the accident, the house was occupied by Isaac Greensfelder as a tenant to the plaintiff, under a written lease. In consequence of a leak in the street pipe, the gas worked through the soil into the plaintiff's house, and Greensfelder, during the night, smelling gas, took a candle and went into the basement of the house; and on arriving there, the gas ignited from the candle, and the explosion took place, causing the damage for which the plaintiff now seeks to recover. It was contended that the defendant was negligent in allowing the gas to accumulate

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upon the premises, and in failing to give notice to the occupants of the house, after the leak was discovered.

The defendant requested the judge to instruct the jury that the company was not liable if Greensfelder was negligent and his negligence contributed to the accident. The judge declined so to rule, and instructed the jury that if they found that by the negligence of the defendant's company explosive gas was allowed to accumulate in and under the house of the plaintiff, then, although the tenant by his negligence ignited the gas, the defendant would be liable; and that if the tenant had intentionally set fire to the gas, the plaintiff could recover for the negligence of the defendant in allowing the gas to accumulate upon the premises.

The defendant offered in evidence certain printed regulations which were given to all the employees of the company for their guidance. Among the other instructions contained in these regulations in cases of leaks, were the following: "Every person in the employ of the company is directed to give to the office the earliest information possible of any gas leak, whether in streets, buildings or public lamps. Complaint of leakage must receive attention in preference to all other complaints." "When the person sent to attend to such case arrives, he is authorized to shut off the gas, if in his judgment it is necessary, and he must always give such instructions to the occupant of the premises as will, if followed by him, preserve the property from injury and protect the persons of the household from accident." It appeared that the gas could be shut off inside the houses at the meter, and that there were valves at certain places in the streets where gas could be shut off from certain districts.

The defendant then offered evidence to show that the direction as to shutting off in the printed rules was intended and understood to apply only to shutting off from the houses, and that only three persons had authority to shut off gas from the streets; and requested the judge to instruct the jury that, in considering the question as to the regulations of the company in case of leakages, the fact that the printed regulations contain directions as to "shutting off the gas" did not preclude the officers of the company from showing that "shutting off" related only to shutting off at the meter; that the point was, whether any other persons had authority to shut off gas from the street, except the three persons above named.

The judge declined to give the instruction in the language requested, but instructed the jury as follows: "The printed regulations which were put in must be taken, so far as the phrase 'shut off the gas' is concerned, according to the natural import of the words. There is nothing which would authorize the company to say: 'We have established printed

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regulations, which, according to the natural import of the words, mean one thing, but we intend another.' That the law does not permit any party to do, who expresses any intent or purpose in writing. He is held to the natural import of his words. This rule, however, does not prevent the company from showing by evidence that the course of their business, and their rules with regard to shutting off gas, are not precisely such as are described in the printed regulations relating to shutting off; it is not, in other words, a thing which binds them; but they are bound to present to you all that they do, and how they do it, as bearing upon the question whether they were in the exercise of due care at this time."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

R. M. Morse, Jr. & C. P. Greenough, for defendant.

N. Morse & H. H. Currier, for plaintiff. 1. The plaintiff is entitled to recover, even though the tenant was negligent. A landlord is not liable for the negligence or wrongful acts of his tenant; for over such acts the lessor has no control. The tenant is not the agent or servant of the lessor in any sense. *Murray v. Richards*, 1 Allen, 414, 416; *Fiske v. Framingham Manuf. Co.*, 14 Pick. 491; *Rich v. Basterfield*, 4 C. B. 783, 801; *Earle v. Hull*, 2 Metc. 353, 360; *Leonard v. Storer*, 115 Mass. 86; S. C., 15 Am. Rep. 76. In order to render a person liable for the negligent act of another, it must appear that the act is done by one acting by such person's command or request, or by one over whose conduct he had control, whose operations he might direct, whose negligence he might restrain. *Hilliard v. Richardson*, 3 Gray, 349. If the lessor is bound to keep the premises in repair, he is then directly liable to third persons for injuries received in consequence of his neglect to repair, to avoid circuitry of action. *Lowell v. Spaulding*, 4 Cush. 277. But this is no exception to the rule that a lessor is not responsible for his tenant's negligence, for in such case the lessor is simply held responsible for his own negligence. It has been expressly held that the negligence of a tenant is no defense to an action brought by a reversioner against a third party for injuries to the reversion. *Egremont v. Pulman*, Mood. & Malk. 404; *Bell v. Twentyman*, 1 Q. B. 766. If the defendant was negligent, it is immaterial that the act of the tenant in igniting the gas contributed to the accident, although his negligence was the proximate cause of the injury. The main or efficient cause was the negligence of the defendant

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in allowing the gas to accumulate upon the premises, and failing to use proper precautions to prevent the explosion ; and for this negligence the defendant is liable. *Metallic Compression Co. v. Fitchburgh Railroad*, 109 Mass. 277 ; *Burrows v. March Gas Co.*, L. R., 5 Ex. 67 ; and L. R., 7 Ex. 96 ; *Lane v. Atlantic Works*, 111 Mass. 136 ; *Hawks v. Northampton*, 116 id. 420. If the defendant was negligent, it is equally liable whether the consequences of this negligence could be foreseen or not. *Smith v. London & South Western Railway*, L. R., 6 C. P. 14. Nor is it material, as affecting the defendant's liability, that the plaintiff may have had a remedy both against the defendant and the tenant. Where there are two tortfeasors, the party injured may proceed against either. *Burrows v. March Gas Co.*, *supra* ; *Lane v. Atlantic Works*, *supra* ; *Gillett v. Western Railroad*, 8 Allen, 560.

2. It was not competent for the defendant to explain the phrase "shut off the gas," in the printed regulations, by parol evidence. The judge rightly instructed the jury, that so far as the phrase "shut off the gas" was concerned, it must be construed according to the natural import of the words : and the other instructions were sufficiently favorable ; for under these instructions the defendant was enabled to show that only three persons had authority to shut off gas from the streets, which was all it asked to show : and there was no ground of exception.

WELLS, J. The injury to the plaintiff's house, of which he complains, resulted from the explosion of gas ignited therein by his tenant. The ruling at the trial was that if "this explosive gas was allowed to accumulate in and under the house of the plaintiff, by the negligence of the defendant company, then, although the plaintiff's tenant by his negligence ignited this explosive substance, the defendant would be liable."

The negligence of the defendant consisted either in permitting a leak to occur through a defect in the main pipe in the street in front of the plaintiff's house, or in neglecting to remedy the difficulty with sufficient promptness after it was discovered.

Assuming that liability for such negligence would extend to injuries occasioned by the accidental ignition of gas which, after escaping from the pipes, had found its way through the soil or otherwise into a neighboring house ; and even that it would include injurious results to which the misconduct or negligence of a stranger contributed, we are of opinion that a tenant, in the actual and legal possession of the property injured, stands in such relation to it as to require the application of a different rule when the injury is due to his misconduct or negligence, as one of several causes by the concurrence of which it was produced. He is in-

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trusted by the owners with the charge and control of the property. He is, *pro hac vice*, the owner.

The ruling at the trial was substantially that no degree or kind of negligence on the part of the tenant would affect the plaintiff's right to recover. This we think was erroneous. If the tenant upon discovering the presence of gas, in large quantity, in the house, neglected to give notice to the agents or servants of the defendant, or to take reasonable precautions to remove or exclude the gas, and recklessly brought the flame of a candle in contact with it, thus bringing about injurious effects which would not have followed but for such reckless or negligent conduct on his part, the defendant ought not to be held responsible for those results. *Hunt v. Lowell Gas-light, Co.*, 1 Allen, 343; *Sherman v. Fall River Iron Works*, 2 id. 524. Whatever of care was requisite for the protection of the premises under the circumstances was due from the occupant. The defendant as well as the plaintiff had a right to expect and require it of him. The measure of duty and the extent of liability of the defendant in respect to the property exposed to injury are not affected by the consideration whether the occupant who has charge of it is in fact owner in fee or tenant for years or at will. If the intervening misconduct of the occupant produced the explosion which was the immediate cause of the injury to the building, the plaintiff cannot charge the legal responsibility for that result upon the original negligent act or omission of the defendant.

The conclusion does not rest upon the ground of any personal relation of agency between the landlord and his tenant, but upon the relation of the latter to the property as having the present control and charge of it, and therefore the one upon whom is devolved the duty to take reasonable care to prevent damage from such causes. The ground upon which it is sought to charge the defendant is the obligation imposed by law upon every one, in the use of his own property and conduct of his own business, to exercise reasonable care not to injure the persons or property of others. The responsibilities growing out of this obligation are modified, the liabilities arising from its disregard somewhat limited, by the correlative obligation, which rests upon every one, to use reasonable care to protect his own property against what may cause injury to it, and to prevent unnecessary damage. *White v. Winnisimmet Co.*, 7 Cush. 155, 161. The plaintiff's right to recover is subject to that modification and limit, and he cannot enlarge his right by intrusting the control of the property, and thus the obligation of due care, to another.

Upon the question whether the defendant's servants were negligent in respect to the taking of proper precautions to prevent injurious conse-

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quences from the leak, the regulations of the defendant, issued for the direction of its servants, were introduced. Among these regulations was one which authorized its servants, or such one as should be sent to attend to the difficulty, to shut off the gas, if in his judgment it should be necessary, with a precaution that "he must always give such instructions to the occupant of the premises as will, if followed by him, preserve the property from injury and protect the persons of the household from accident." If this precaution did not of itself require the regulation to be construed as applying only to shutting off the gas from the separate houses, there was a latent ambiguity which it was competent to remove by the parol evidence offered for that purpose. The instructions upon this point did not meet the requirements of the case.

Exceptions sustained.

AMES V. UNION RAILWAY COMPANY.

(117 Mass. 541.)

Carrier — liability to master for injury to apprentice.

A declaration in tort alleged that the defendant was a common carrier of passengers between two places ; that the plaintiff's apprentice was on the defendant's car on a day stated, for hire paid by the apprentice in the absence of the master ; that by the defendant's negligence in carrying the apprentice, he was injured, and the plaintiff thereby lost his services. *Heid*, on demurrer, that the declaration disclosed a good ground of action.

TORT. The declaration was as follows : " And the plaintiff says that the defendants own or lease a horse railroad, and operate the same between Boston and Cambridge, in the State of Massachusetts, as common carriers of passengers. And the plaintiff says that one Charles Andrew Owler, a minor of the age of fifteen years or thereabouts, on the 27th day of September, A. D. 1873, and long before and still is the plaintiff's apprentice and servant, and duly bound to the plaintiff to serve him for and during the term of three years from and after the 1st day of March, A. D. 1872, according to an indenture of apprenticeship, a copy whereof is annexed to this declaration. And the plaintiff says that on or about said 27th day of September, A. D. 1873, said Owler, the plaintiff's apprentice and servant as aforesaid, was lawfully on said defendant's car as a passenger at Cambridge aforesaid, for hire paid by said apprentice in the absence of the master, and it became the duty of the defendants to use due and proper care and skill in and

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about the carrying and conveying said apprentice; and the defendants omitted and neglected to use due and proper care and skill, and so negligently and unskillfully conducted themselves by their agents and servants, in and about the carrying and conveying said apprentice, and in their conducting, managing, driving, and directing the said car and the horses thereto attached; that said car was driven against a team, and thereby said Owler, apprentice as aforesaid, received divers wounds, bruises and injuries, and was obliged to have and did have his leg amputated, whereby and by reason whereof the said Owler was rendered unable to do any business or service for the plaintiff, and said disability continued from said 27th day of September, A. D. 1873, till the 2d day of February, A. D. 1874.

“And the plaintiff says that on said 2d day of February, A. D. 1874, said Owler returned to the service and apprenticeship of the plaintiff, but the plaintiff says that by reason of said wounds, bruises and injuries, and the loss of his, the said Owler's, leg, his the said Owler's services were and are almost useless to him the plaintiff, and will so continue to the end of his apprenticeship, February 28th, A. D. 1875, though the plaintiff has been and is obliged to pay for the same according to said indenture, and the plaintiff has so done and is so doing.

“And the plaintiff says that at the time of said collision said Owler's services had become very valuable to him, as he had become expert under the plaintiff's care and instruction, and were worth to him a large sum over and above the amount he was obliged to pay said Owler by said indenture, and which benefit he would have been, and was, and is entitled to by said apprenticeship to the end thereof, but for the injuries and their consequences received on the body of said apprentice as aforesaid. And the plaintiff says, that by reason of the said injuries being inflicted on his apprentice and servant, he has been and will be put, during said apprenticeship, to great expense in filling his said apprentice's place during his absence on account of said injuries, and to help do said apprentice's work and duty since his return to service.

“And the plaintiff says that by reason of said injuries inflicted he has been unable to fulfill his work, which said apprentice could otherwise have done, and has been put to great damage in consequence thereof, and has lost his contracts and the benefits from them to be derived.

“And the plaintiff says, that his said apprentice and servant was, at the time of the said injuries received, in the place by the authority of and for the interest of the plaintiff, in the exercise of due care, and that the defendants by themselves, their agents and servants, by their negligence and unskillfulness in driving and managing said car, occasioned the said

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accident and the injuries to the plaintiff through his servant and apprentice."

The defendant demurred to the declaration, and for causes of demurrer assigned: "That the declaration does not state a legal cause of action. And in particular said declaration is defective, for the reason that the defendant is not liable to the plaintiff for the breach of a contract of carriage made between the alleged apprentice and the defendant, to which the plaintiff was not a party."

The Superior Court sustained the demurrer, and ordered judgment for the defendant; and the plaintiff appealed.

W. Emery, for defendant. 1. The relation created between the apprentice and the defendant, by the former's riding on the car as a passenger for hire, paid by himself, was one of contract. *Sears v. Eastern Railroad*, 14 Allen, 433. The contract was one which a minor has a right to make for his own benefit, and was valid. *Bradford v. French*, 110 Mass. 365. A contract of a passenger carrier is unlike that of a common carrier of goods. The carrier of a passenger is not an insurer; he stipulates only to use care and skill to prevent an injury to the passenger. And he is liable only for a breach of that for which he stipulates. *Ingalls v. Bills*, 9 Metc. 1; *Readhead v. Midland Railway*, L. R. 4 Q. B. 379; *Frost v. Grand Trunk Railroad*, 10 Allen, 387.

2. A stranger to a contract cannot maintain an action for the breach of a duty arising out of the same. *Winterbottom v. Wright*, 10 M. & W. 109; *Collis v. Selden*, L. R., 3 C. P. 495. The cause of action in this case is based on an injury received by the apprentice while a passenger on the defendant's car under a contract of carriage, and caused by the negligence of the defendant. Although the form of the action is properly brought in tort, it is in substance for a wrong the defendant was under a contract with the apprentice not to do. The wrong springs from the breach of the contract. Torts springing from contracts, consisting in omitting contract duty, can be maintained only by the persons contracting. *Alton v. Midland Railway*, 19 C. B. (N. S.) 213; *Fairmount Railway v. Stutler*, 54 Penn. St. 375.

M. A. Blaisdell, for plaintiff.

WELLS, J. The relation of master and apprentice set forth in this declaration is such as will sustain an action in the name of the master for an injury to the apprentice causing disability, *per quod servitium amisit*. 1 Chit. Pl. (3d Am. ed.) 47; Reeve's Dom. Rel. 376; Bac. Abr.,

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Master & Servant, O; *M'Carthy v. Guild*, 12 Metc. 291; *Dennis v. Clark*, 2 Cush. 347; *Rice v. Nickerson*, 9 Allen. 478; *Kennedy v. Shea*, 110 Mass. 147; S. C., 14 Am. Rep. 584; *Martinez v. Gerber*, 3 Scott N. R. 386; S. C., 3 Man. & Gr. 88; *Hodsoll v. Stallebrass*, 11 A. & E. 301; *Hall v. Hollander*, 4 B. & C. 660; *Woodward v. Washburn*, 3 Denio, 369.

The tort alleged does not consist in the breach of any contract. Even if the contract arising from the purchase of a ticket were held to have been made with the apprentice alone and in his own right, it would not exclude liability in tort for injuries caused by the negligence of the defendant; and upon that liability an action may be maintained by any one who has suffered damage by means thereof. The degree of care required of the defendant, and thus the question whether there was any liability in tort, might be affected by the existence of the relation of contract between the defendant and the person injured. But a tort, not consisting merely in a breach of the contract, being proved, the right to recover for the damages caused must be governed by the general rule of law; and, under that rule, will be determined by the nature of the injury, and of the right or interest injuriously affected. 3 Bl. Com. 142; *Marshall v. York, Newcastle & Berwick Railway*, 11 C. B. 655; 7 Eng. L. & Eq. 519. The judgment for the defendant must therefore be reversed, and the

Demurrer overruled.

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KIFF v. OLD COLONY & NEWPORT RAILWAY COMPANY.

(117 Mass. 591.)

Attachment — when officer trespasses — of goods in carrier's possession.

An officer, who attaches goods exempt by law from attachment, is a trespasser. If goods exempt from attachment are taken from a carrier by an officer, who attaches them as the property of the owner, it is no defense, to an action against the carrier by the owner for failure to deliver the goods, that they were taken from him against his will and without fraud or collusion on his part, or that he was ignorant of the nature of the goods, and supposed the attachment to be valid.

TORT, with a count in contract, against the defendant as a common carrier, for a failure to deliver certain property described in the declaration as spirituous liquors, and alleged to be of the value of \$713.

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At the trial in the Superior Court, before BACON, J., the plaintiff offered evidence tending to show that the property was his, was shipped by him, and came into the possession of the defendant as a common carrier, and was so in its possession at Boston in due course of transportation to Belfast, Maine; that the defendant failed to deliver it to him at Boston on demand.

The defendant then offered evidence tending to show that on the day the goods were received by it at Boston, they were taken from its possession by Robert S. Carroll, a duly appointed and qualified constable of the city of Boston, without fraud or collusion on its part, against its will, and with no knowledge that they were spirituous liquors, on a legal and valid writ of attachment, having an *ad damnum* of three hundred dollars against the plaintiff in the case at bar and in favor of William F. Nye.

The defendant then requested the judge to rule, that if the goods were taken from its possession on a legal and valid writ of attachment against the plaintiff, by a proper officer, without fraud or collusion on its part, against its will, and with no knowledge that they were spirituous liquors, it was not liable for a failure to deliver the goods to the plaintiff. The judge declined so to rule, and ruled that the goods were not liable to be taken on a writ of attachment against the owner; that the facts offered to be shown by the defendant constituted no defense to this action, and that the only question for the jury was the value of the property at the time the defendant failed to deliver it to the plaintiff, to which the defendant alleged exceptions.

The judge, after verdict, reported the case for the consideration of this court; if the rulings for the plaintiff were sustained, judgment to be entered on the verdict; if not, the verdict to be set aside.

J. H. Benton, Jr., for defendant.

C. W. Clifford, for plaintiff.

GRAY, C. J. [after considering the statutes prohibiting the sale of intoxicating liquors.] It follows that the plaintiff's liquors were not liable to attachment, the attachment of them was illegal, and the officer who attached them a trespasser. *Bean v. Hubbard*, 4 Cush. 85; *Deyo v. Jenison*, 10 Allen, 410, 413.

Every common carrier of goods being in the nature of an insurer, liable — upon the grounds of public policy, and to guard against the possibility of fraud and collusion on his part — for all losses, even by accident, trespass, theft, robbery, or of any kind of unlawful taking, except

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ing only those arising by act of God or of public enemies, it also follows that it was rightly ruled at the trial that the facts offered to be shown by the defendant corporation constituted no defense to this action against it as a common carrier. 2 Kent's Com. (12th ed.) 597; *Coggs v. Bernard*, 2 Id. Raym. 909, 918; S. C., 3 Salk. 11; *Edwards v. White Line Transit Co.*, 104 Mass. 159; S. C., 6 Am. Rep. 213; *Adams v. Scott*, id. 164, 166.

Judgment on the verdict for the plaintiff.

DOYLE v. LYNN & BOSTON RAILROAD COMPANY.

(118 Mass. 195.)

Sunday — action for injuries while traveling on.

One who travels from one town to another on the Lord's day for the sole purpose of visiting a friend, whom he knows to be sick and thinks may be in need of assistance, and of rendering such assistance as on inquiry he might find to be necessary, is traveling from charity; and in an action against a railroad corporation, for injuries sustained while a passenger on that day, on putting in evidence that he was traveling for the purpose above stated, he is entitled to go to the jury on the question whether he was traveling lawfully or not, although he offers no evidence of the ground of his belief that his friend was in need of assistance.

TORT for injuries sustained by the plaintiff while a passenger in one of the defendant's cars.

At the trial in the Superior Court, before LORD, J., the plaintiff testified that he resided in Lynn, and that on Sunday, November 10, 1872, he went to Boston in a car of the defendant corporation, and that on his return in another car of the defendant, he received the injuries complained of. Upon the question whether he was traveling lawfully on that day, he testified that his brother Martin came to Lynn, on Saturday afternoon or evening; that he had previously received a letter from him announcing his purpose to come to Lynn, and proposing to him to go to Boston on Sunday to see one Sweeny, a friend of both of them, who was sick; that the plan of going to Boston on Sunday was arranged on Saturday night; that he and his brother went to Boston on Sunday for the sole purpose of visiting this sick friend whom his brother had known for many years, and with whom he had been acquainted in Maine several years before, and for the purpose of seeing if he was in need of any thing; that they did visit him in Boston, and had no other errand in Boston, and did nothing else when there, except to get some supper in a saloon; that they found Sweeny sitting in a rocking

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chair, who told them that he had a doctor, which the plaintiff then learned for the first time; that they reached Boston about four o'clock in the afternoon, and took the car to return between six and seven.

Martin Doyle, the brother of the plaintiff, testified that he came to Lynn on Saturday afternoon from Woonsocket (where he had previously resided, and where he had been in business until a week or two before, but to which place he did not intend to return), passing through Boston, on his way, without calling on Sweeny; that he knew Sweeny was sick, and thought he might be in need of assistance, and that he went to Boston on Sunday solely for the purpose of seeing Sweeny, and rendering him such assistance as on inquiry he might find to be necessary; that they found him at his house sick, and inquired if he was in need of any assistance, to which he replied in the negative.

There was no evidence that either the plaintiff or his brother had any information leading them to think that Sweeny might be in need of assistance; and the brother testified that he had no special reason for thinking that he did need assistance.

The plaintiff was a laboring man and was constantly employed about his work during the week. His brother had given up his business in Woonsocket about ten days before and came to Lynn on Saturday, as above stated, to visit his brother and a sister who lived there. Both of the witnesses testified that they had heard of the great fire then raging in Boston, before they left Lynn, but that they did not go to see it, and did not see it, and took a route to Sweeny's house, by which they avoided the scene of the fire, on account of the crowd.

There was no different evidence on this part of this case; and the judge ruled that upon this evidence the jury would not be warranted in finding that the plaintiff was traveling lawfully on the Lord's day, but would be required to find that he was so traveling unlawfully as to preclude him from recovering, even if he proved every thing else essential to his case, and directed the jury to find for the defendant.

The case was reported to this court. If the ruling as above stated was correct, judgment was to be rendered on the verdict; otherwise the verdict to be set aside and a new trial granted.

S. B. Ives, Jr. (G. L. Huntress with him), for plaintiff.

E. Tappan, for defendant.

GRAY, C. J. The provision of the Lord's Day Act, which prohibits traveling, like that which forbids the doing of any business, labor or

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work, excepts what is done from "necessity or charity." Gen. Stats., ch. 84, §§ 1, 2. The exception has been often said by this court to cover every thing which is morally fit and proper to be done upon that day under the particular circumstances of the case. *Commonwealth v. Knox*, 6 Mass. 76, 77; *Flagg v. Millbury*, 4 Cush. 243, 245; *Bennett v. Brooks*, 9 Allen, 118, 123; *Commonwealth v. Sampson*, 97 Mass. 407, 409. In the last case, Mr. Justice HOAR said that acts to prevent or relieve suffering of men or animals would unquestionably fall within the exception.

In considering what is lawful or fit to be done on the Lord's day, "charity" must include every thing which proceeds from a sense of moral duty, or a feeling of kindness and humanity, and is intended wholly for the purpose of the relief or comfort of another, and not for one's own benefit or pleasure. That a visit to a sick child or other near relative upon the Lord's day is within the exception is well settled. *Pearce v. Atwood*, 13 Mass. 324, 350, 351; *Gorman v. Lowell*, 117 Mass. 65; *McClary v. Lowell*, 44 Vt. 116; S. C., 8 Am. Rep. 366. The same reason extends to the case of a sick friend.

In the case at bar, there was evidence tending to show, and which would have warranted the jury in finding, that the plaintiff was traveling with his brother for the sole purpose of visiting a common friend, whom they knew to be sick, and thought might be in need of assistance, and of rendering such assistance as on inquiry they might find to be necessary. The absence of evidence of the grounds of their knowledge or belief is immaterial, except as a circumstance to be considered by the jury in determining whether the real purpose of their journey was as the rest of the evidence tended to show. *Myers v. State*, 1 Conn. 502. The jury having been instructed otherwise, the

Verdict must be set aside.

RICE v. HART.

(118 Mass. 201.)

Carrier — railroad — delivery.

A railroad corporation ceases to be a common carrier and becomes a warehouseman, as matter of law, when it has completed the duty of transportation and assumed the position of warehouseman, as matter of fact and according to the usages and necessities of the business in which it is engaged.

Goods delivered to a railroad corporation, as a common carrier, for transportation, reached the point of destination at half-past three in the afternoon of Saturday, in one of

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the rear cars of a long freight train, which on account of its length was divided into sections, and these were moved up separately to the freight station, and their contents discharged. The consignee's teamster, who was sent for the goods, reached the station at a quarter-past four of the same afternoon, and remained until five, at which time the car containing the goods had not been moved up to the station or discharged. He was told by the agents of the carrier that the goods would not be ready for delivery that day, but that when reached they would be placed in the freight station near the door, where he could get them on the following Monday. The goods were discharged and placed in the freight station on Saturday, but too late for delivery, and the building and its contents were destroyed by fire that night, without any negligence on the part of the railroad corporation. *Held*, that the liability of the railroad corporation as a carrier was ended before the loss of the goods. (*See note, p. 441.*)

CONTRACT against William T. Hart and others, trustees under a mortgage executed by the Boston, Hartford and Erie Railroad Company, and in possession of and operating the said railroad, to recover the value of forty-three bags of wool, valued at \$4,692.37, delivered by the plaintiffs to the defendants as common carriers, to be transported from New York to Boston. The case was submitted to the judgment of this court on agreed facts in substance as follows :

The defendants are common carriers, and as such received from the plaintiffs, for transportation over their railroad, the wool in question. The wool reached Boston in one of the rear cars of a long train over the defendants' road on Saturday, November 9, 1872, about half-past three o'clock in the afternoon. The train was much longer than the freight station and platform at which the same was to be discharged, and for this reason was broken into sections, which were moved up separately and their contents discharged. The plaintiffs sent a man and wagon to the defendants' yard to receive and carry away the wool, who reached the freight station about a quarter-past four in the afternoon, and remained until about five, at which time the cars which contained the wool had not been moved up to the freight station or discharged; and the driver was told by one of the defendants' agents that the wool would not be ready for delivery that day, but that when it was reached it would be put in the freight station near the door on Broad street, where he could easily get at it and load it into his wagon on Monday. The wool was discharged from the cars into the freight warehouse on Saturday afternoon, but not until too late for its delivery that day to the plaintiffs; and the building and its contents, including the plaintiffs' wool, were totally consumed by fire during the night of Saturday. The yard and freight station of the defendants' road, and of the other railroads in Boston, are closed for the delivery of freight at half-past five in the afternoon on Saturday, and are not again open for business until Monday morning, and were so closed on the Saturday in question. The fire was not occa

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sioned by the fault or neglect of the defendants, nor are they chargeable with neglect for not removing the plaintiffs' wool when it became apparent that the building where it was stored would be destroyed, nor with want of diligence in discharging said wool from their cars on Saturday, other than such as may be implied from the foregoing facts. The value of the plaintiffs' merchandise destroyed by the fire is correctly stated in the declaration.

If in the opinion of the court the defendants are liable for the loss of said merchandise, judgment is to be entered for the plaintiffs for the value of said merchandise, and interest from the date of the writ; otherwise, judgment for the defendants.

G. W. Baldwin, for plaintiffs. 1. This case is distinguishable in its facts from that of *Norway Plains Co. v. Boston & Maine Railroad*, 1 Gray, 263. In that case, the plaintiffs' agent consulted his own convenience in going away, and the goods were subsequently stored for his accommodation. In the case at bar, the plaintiffs' agent had no choice and exercised no discretion in the matter, and was in no way responsible for what afterward occurred.

The point decided in the case of the *Norway Plains Co.* is, that railroad corporations, as common carriers, are not bound to actually deliver the goods to the consignee; and that if upon the arrival of the goods the consignee is not there ready to receive them, "and in consequence of this they are placed in the depot, the transit ceases," "because he must be presumed to have assented thereby to such action on the part of the corporation," and "that delivery by themselves, as common carriers, to themselves, as keepers for hire, conformably to the agreement of both parties, is a delivery which discharges their responsibility as common carriers." The whole reasoning of the court is founded upon this presumed agreement. But this fact does not exist in the case at bar. On the contrary, it appears affirmatively that the plaintiffs were present and ready to receive the goods, and were compelled by the defendants' agents to go away without them, so that the very foundation of the presumption is gone.

The opinion should also be read in the light of the cases referred to by the court in its support. In *Thomas v. Boston & Providence Railroad*, 10 Metc. 472, HUBBARD, J., says: "Where such suitable warehouses are provided, and the goods, which are not called for on their arrival at the places of destination, are unladed and separated from the goods of other persons, and stored safely in such warehouses or depots, the duty of the proprietors as common carriers is, in our judgment, determinated."

See also *Garside v. Trent & Mersey Navigation*, 4 T. R. 581 ; *Rowe v. Pickford*, 8 Taunt. 83 ; *In re Webb*, id. 443. It is submitted that the decision in the *Norway Plains Company* case was intended to apply, and not to extend the doctrine of these cases. The doctrine, with its limitations, has been reaffirmed by this court in the recent case of *Bickford v. Metropolitan Steamship Co.*, 109 Mass. 151. See also *Hill Manuf. Co. v. Boston & Lowell Railroad*, 104 Mass. 122 ; S. C., 6 Am. Rep. 202 ; *Stowe v. New York, Boston & Providence Railroad*, 113 Mass. 521.

2. If the doctrine of *Norway Plains Co. v. Boston & Maine Railroad* leads to any other conclusion, it is submitted that to that extent it is a fit subject for reconsideration, and that it should be brought into harmony with the later English and American authorities. The English rule laid down by TINDAL, C. J., in *Gatliffe v. Bourne*, 4 Bing. N. C. 314, and affirmed by the House of Lords in 11 Cl. & Fin. 45, has met with very general approval, both in that country and this. It holds that carriers are bound to deliver the goods to the consignee, provided the consignee appears within a reasonable time to receive them, and that the consignee is entitled to a fair and reasonable opportunity to receive his goods before the carrier can deliver them over to himself or to another as warehouseman. To the same effect is the rule adopted by the Supreme Court of the United States in *The Eddy*, 5 Wall. 481 ; and in *Richardson v. Goddard*, 23 How. 28.

The courts of Illinois, Indiana, Iowa and Pennsylvania are sometimes referred to as sustaining the Massachusetts doctrine. But none of them go so far as to establish the arbitrary rule that the moment the goods are deposited in the carrier's warehouse, that moment his liability as a carrier ends. *Porter v. Chicago Railroad*, 20 Ill. 407 ; *Chicago Railroad v. Scott*, 42 id. 132 ; *Bansemer v. Toledo Railway*, 25 Ind. 434. The case of *Francis v. Dubuque Railroad*, 25 Iowa, 60, turns upon the presumed assent of the consignee, signified by his failure to receive the goods on their arrival. And *McCarty v. New York & Erie Railroad*, 30 Penn. St. 247, which is the leading case in Pennsylvania, adopts the rule laid down in *Goold v. Chapin*, 10 Barb. 612 : "It must be implied in every contract of this nature, that if the consignee is not found, or does not immediately accept the goods when offered, the carrier may, if he so elect, keep them as bailee in deposit."

Most of the American cases hold that the liability of the carrier continues until a reasonable opportunity has been afforded the consignee, after the arrival of the goods, to take them away. *Moses v. Boston & Maine Railroad*, 32 N. H. 523 ; *Wood v. Crocker*, 18 Wis. 345 ; *Wood*

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v. *Milwaukee Railway*, 27 Wis. 541 ; S. C., 9 Am. Rep. 465 ; *Parker v. Milwaukee Railway*, 30 Wis. 689 ; *Conkey v. Milwaukee Railway*, 31 id. 619 ; S. C., 11 Am. Rep. 630 ; *McDonald v. Western Railroad*, 34 N. Y. 497 ; *Redmond v. Liverpool Steamboat Co.*, 46 id. 578 ; S. C., 7 Am. Rep. 390 ; *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442 ; S. C., 10 Am. Rep. 402 ; *McAndrew v. Whitlock*, 52 N. Y. 40 ; S. C., 11 Am. Rep. 657 ; *Quimit v. Henshaw*, 35 Vt. 605 ; *Blumenthal v. Brainerd*, 38 id. 402 ; *Alabama Railroad v. Kidd*, 35 Ala. 209 ; *Mobile Railroad v. Prewitt*, 46 id. 63 ; S. C., 7 Am. Rep. 586 ; *Graves v. Hartford Steamboat Co.*, 38 Conn. 143 ; S. C., 9 Am. Rep. 369 ; *McMillan v. Michigan Railroad*, 16 Mich. 79 ; *Richardson v. Goddard*, 23 How. 28 ; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318 ; *The Mary Washington v. Ayres*, 5 Am. Law Reg. (N. S.) 692 ; *Maignan v. New Orleans Railroad*, 24 La. Ann. 333. The general result has been very well stated by SEYMOUR, J., in *Graves v. Hartford Steamboat Co.*, which is the most recent case upon the subject: "The rule adopted in Massachusetts has the merit of being definite and of easy application, and may, in many cases, avoid a painful controversy as to what, under the circumstances, is a reasonable time within which the consignee must appear and take his goods. But on the other hand, that rule puts an end to the carrier's responsibility, as such, just where that responsibility is of the highest value to the shipper. Between the deposit of the goods on the platform and their delivery to the consignee, they are exposed to theft, depredation and injury by strangers, and by the carrier's employees. In making the delivery, care is needed to avoid mistakes, and attention required to see if the goods are uninjured. During the whole process of delivery, until fully completed, the goods should remain in the care of the carrier, upon the full responsibility pertaining to him as such, and he ought not to be allowed to lay aside that responsibility until the owner of the goods has had a fair and reasonable time and opportunity to receive them." See also an extended analysis and classification of the American cases prior to 1867, by COOLEY, C. J., in *McMillan v. Michigan Railroad*, 16 Mich. 103 ; and in 2 Kent's Com (12th ed.) 604 ; 2 Redf. on Railways (5th ed.) 77 ; Redf. on Carriers. § 110 ; and note to *Graves v. Hartford Steamboat Co.*, 12 Am. Law Reg. (N. S.) 31.

The case of *Shepherd v. Bristol Railway*, L. R., 3 Ex. 189, was decided upon its peculiar circumstances. The plaintiff's cattle arrived at the defendant's station in London on Sunday morning. "The plaintiff's servant was there, and had it not been Sunday would at once have driven them away. But being Sunday, and being liable to a fine if he drove them on that day through the streets, he was permitted to put them

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into a pen, where he fed them and shut them up." During the day two of them were killed. BRAMWELL, B., who gave the opinion of the majority of the court, says: "If there is any evidence of a refusal to deliver on the Sunday, which I doubt, nevertheless, I, as jurymen cannot find such refusal." MARTIN, B., dissents, upon the ground that the "liability as carriers does not end until there has been a delivery in what is the ordinary and usual way," and adds: "This is a pure question of fact, and in my opinion they were not delivered, either actually or constructively."

W. G. Russel & R. R. Bishop, for defendants. Under the settled rule of law in this Commonwealth, the liability of the proprietors of a railroad as common carriers of goods ceases when the goods have been unladen from the car and placed upon the platform in the depot at their place of destination. The transit of the goods is then determined, and the carrier is thereafter liable only as a warehouseman, and not for loss occurring without fault on his part. *Thomas v. Boston & Providence Railroad*, 10 Met. 472; *Norway Plains Co. v. Boston & Maine Railroad*, 1 Gray, 263; *Sessions v. Western Railroad*, 16 Gray, 132; *Rice v. Boston & Worcester Railroad*, 98 Mass. 212; *Denny v. New York Central Railroad*, 13 Gray, 481. The facts agreed bring this case in every respect within the rule of *Norway Plains Co. v. Boston & Maine Railroad*. In that case, as in this, there was delay in the arrival and delivery of the goods; the agent of the consignee in that case, as in this, was at the depot after the arrival of the goods, and was correctly informed that they were in the rear part of the train, and would not be reached for delivery during business hours of that day; and in each case the delay in the delivery arose from the fact that the train was longer than the freight station. In each case the goods were placed upon the platform too late for delivery on the day of arrival, and were burned by accidental fire on the ensuing night. The Massachusetts rule has been followed in *Porter v. Chicago Railroad*, 20 Ill. 407; *New Albany Railroad v. Campbell*, 12 Ind. 55; *Bansemer v. Toledo Railway*, 25 id. 434; *Francis v. Dubuque Railroad*, 25 Iowa, 60; *Jackson v. Sacramento Valley Railroad*, 23 Cal. 268, 272; *Hilliard v. Wilmington Railroad*, 6 Jones (No. Car.), 343; *Neal v. Wilmington Railroad*, id. 482. See also *Shepherd v. Bristol Railway*, L. R., 3 Ex. 189. Of the cases cited against the Massachusetts rule, those which relate to the liability of the carrier for goods which have not reached their ultimate destination, but which are in his hands for delivery to the next carrier in the line

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of transportation, are not in point. *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318.

GRAY, C. J. This case is not distinguishable from that of *Norway Plains Co. v. Boston & Maine Railroad*, 1 Gray, 263.

In that case, so far as one lot of goods was concerned, as in this, the agent of the consignee was at the station after the arrival of the goods, prepared to receive them ; but the defendants were not, and, if he had remained, would not have been, ready to deliver them in time to be put in a place of safety elsewhere on that day, and they were destroyed in the station by fire the ensuing night ; and Chief Justice SHAW, in delivering the opinion, said that the court considered all the circumstances stated, as to the agent calling for the goods, waiting, and at last leaving the depot before they were ready, to be immaterial.

The court had previously held in *Thomas v. Boston & Providence Railroad*, 10 Metc. 472, that where suitable warehouses were provided by a railroad corporation, and goods, not called for on their arrival at the place of destination, were unladen and separated from the goods of other persons, and stored safely in such warehouses, the duty of the corporation as common carriers was terminated.

The judgment in *Norway Plains Co. v. Boston & Maine Railroad* went further ; and was put upon the ground that, from the necessary condition of the business of railroad corporations, and from their practice to have platforms on which to place goods from the cars in the first instance, and warehouse accommodations by which they may be securely stored, the goods of each consignment by themselves, in accessible places, ready to be delivered, the whole duty assumed by the railroad corporation is to carry the goods safely to the place of destination and there discharge them upon the platform, and then and there deliver them to the consignee or party entitled to receive them, if he is there ready to take them forthwith, or, if he is not there ready to take them, then to place them securely and keep them a reasonable time, ready to be delivered when called for that delivery from themselves as common carriers, to themselves as keepers for hire, discharges their responsibility as common carriers ; that they are responsible as common carriers until the goods are removed from the cars and placed on the platform ; that if, on account of their arrival in the night, or at any other time when by the usage and course of business the doors of the merchandise depot or warehouse are closed, or for any other cause, they cannot then be delivered, or if for any reason the consignee is not there ready to receive them, it is the duty of the company to store them and preserve them safely, under the charge

of competent and careful servants, ready to be delivered, and actually deliver them when duly called for by parties authorized and entitled to receive them; and for the performance of these duties, after the goods are delivered from the cars, the company are liable as warehousemen or keepers of goods for hire.

In short, the railroad corporation ceases to be a common carrier and becomes a warehouseman, as matter of law, when it has completed the duty of transportation and assumed the position of warehouseman, as matter of fact and according to the usages and necessities of the business in which it is engaged.

The rule then established, after argument by eminent counsel and upon much consideration, and supported by great force of reasoning, has ever since been considered law in this Commonwealth. *Sessions v. Western Railroad*, 16 Gray, 132; *Rice v. Boston & Worcester Railroad*, 98 Mass. 312; *Miller v. Mansfield*, 112 id. 260; *Stowe v. New York, Boston & Providence Railroad*, 113 id. 521. And it has been recognized, in the ablest decisions which have taken a different view of the subject, as a rule of a definite and practical character and of easy application. *Moses v. Boston & Maine Railroad*, 32 N. H. 523, 543; *Graves v. Hartford & New York Steamboat Co.*, 38 Conn. 143, 151; S. C., 9 Am. Rep. 369.

Upon a careful examination of the numerous decisions in other States, fully collected in the elaborate arguments at the bar, some in accordance and some in conflict with the judgment of this court, we find nothing which adds to or controls the reasoning of Chief Justice SHAW, upon which, more than twenty years ago, the law of this Commonwealth was authoritatively declared.

This case does not require us to consider whether the rule should extend to a case in which the goods have not arrived at their final destination, but are held by one railroad corporation in a warehouse at the end of its own line, with the duty of forwarding them by another carrier to their ultimate destination — as to which the judgments of the Supreme Court of the United States in *Railroad Company v. Manufacturing Co.*, 16 Wall. 318, and of the Court of Appeals of New York in *McDonald v. Western Railroad*, 34 N. Y. 497, seem to be in conflict with the opinions expressed in *Denny v. New York Central Railroad*, 13 Gray, 481, 487, and *Judson v. Western Railroad*, 4 Allen, 520, 523.

The other cases, cited for the plaintiffs, in the Supreme Court of the United States, the House of Lords, the Court of Appeals of New York, and this court, were cases of common carriers by sea, who have not the

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same means of warehousing goods at their destination, and are not therefore within the rule which governs railroad corporations.

Judgment for the defendants.

NOTE.—See *Illinois Central R. R. Co. v. Mitchell*, 18 Am. Rep. 564; *Chicago N. W. Ry. Co. v. Sawyer*, id. 613; note to *Mobile, etc. R. R. Co. v. Prewitt*, 7 id. 586; *Winslow v. Vermont R. R. Co.*, id. 365.—REP.

MATHESON V. EQUITABLE MARINE INSURANCE COMPANY.

(118 Mass. 209.)

Marine Insurance — total loss after repairs of partial loss.

By the general law of marine insurance, independently of any particular clause in the policy or local usage, if a partial loss of a vessel insured is repaired and a total loss afterward happens during the term of the policy, the insurer is liable for the amount of both losses, although it exceeds the amount named in the policy.

CONTRACT upon a policy of marine insurance issued by the defendant to Robert Soper & Son, for whom it concerns, loss, if any payable to the plaintiff, “for \$300 on one-sixteenth of the schooner *Thraver*, and \$300 on one-sixteenth of outfits on board said schooner for a whaling voyage at and from Boston, commencing the risk on November 21, 1870, at noon, and terminating when she arrives at her port to discharge in the United States and is discharged; “Schooner valued at \$5,000; outfits, \$5,000;” and containing the following clauses:

“Touching the adventures and perils which the said insurance company are contented to bear, and take upon them in this voyage, they are, of the seas, fire, enemies, pirates, assailing thieves, restraints and detentions of all kings, princes or people, of what nation or quality soever, barratry of the master (unless the insured be owner of the vessel) and of the mariners, and all other losses and misfortunes which have or shall come to the damage of the said schooner and outfit or any part thereof, to which insurers are liable by the rules and customs of insurance in Boston.” “And in case of any loss or misfortune, it shall be lawful for the insured, his factors, servants and assigns, to sue, labor and travail for, in and about the defense, safeguard and recovery of the said schooner and outfits or any part thereof, without prejudice to this insurance; to the charges whereof, the said insurance company will contribute, in proportion as the sum insured is to the whole sum at risk. And so the president

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and directors aforesaid are contented, and do hereby bind the capital stock and other common property of the said insurance company to the insured, his executors, administrators and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them, for this insurance, by the insured, at and after the rate of $\frac{1}{2}$ per cent per month, guarantee 3 per cent. To add 1 per cent if to or from ports in Texas or Mexico, in the time; and 1 per cent if to or from ports in the West Indies, between July 15th and October 15th; and $\frac{1}{2}$ per cent if in Bay St. Lawrence in September, and $\frac{3}{4}$ per cent if there in October." "And that the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of an abandonment."

The parties submitted the case to the judgment of the Superior Court upon the following facts: "The vessel sailed from Boston, on the voyage described in the policy, on or about November 21, 1870, and while in the course of said voyage sustained two partial losses by the perils of the sea, insured against, one in October, 1871, the other in September, 1872, and in consequence of those losses was each time compelled to put into Bermuda, where she was repaired at a cost in each case exceeding seven per cent of the amount insured, exclusive of all charges and expenses incurred for the purpose of ascertaining and proving the loss. Afterward, on February 2, 1873, the vessel, being still in the prosecution of said voyage, was totally lost, with all her outfits, by a peril of the sea. The defendant had due notice of said losses and the adjustment of the same more than sixty days prior to the date of the plaintiff's writ.

"The amount of the two partial losses was \$174.73. There is due to the defendant, on account of the policy for premiums, savings, etc., the sum of \$97.20. It is agreed that the plaintiff is entitled to recover the sum of \$600 as for a total loss, less said sum of \$97.20, with interest thereon from the date of the writ. It is further agreed, if evidence of the same would be competent, that a practice exists among the underwriters of Boston, in cases like the present, to pay for partial losses in addition to the total loss, even though the amount so paid exceeds the amount of the policy.

The Superior Court gave judgment for the plaintiff for the sum of \$502.80, being the amount of the total loss, and also for the sum of \$174.73, being the amount of the two partial losses, with interest on both sums from the date of the writ. The defendant appealed to this court.

C. G. Thomas, for plaintiff.

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H. C. Hutchins & H. H. Currier, for defendant.

GRAY, C. J. A policy of marine insurance is a contract by which, for a consideration stipulated to be paid by one interested in a ship, freight or cargo, subject to marine risks, another undertakes to indemnify him against some or all of those risks during a certain period or voyage; in other words, that, so far as the perils insured against are concerned the subject insured shall remain, throughout the term of the policy, of the value which it had at the beginning of the adventure. If that value is fixed by the policy, it is conclusive upon the parties; and the liability of the underwriter for each loss during the adventure is limited to such proportion of the actual loss as the amount insured bears to the value of the property at risk.

If the subject is one totally lost, either actually or constructively, it ceases to exist for the purpose of the policy, and even if it is not entirely destroyed, the underwriter, by paying that loss, fulfills his contract, and is exempt from liability for any subsequent injury to it. If a partial loss occurs, and before it is repaired a total loss ensues during the term of the policy, the underwriter is liable for the amount of the total loss only, because that is equivalent to the whole damage which the assured has sustained, and affords him a full indemnity.

But if the partial loss is repaired by the assured, the undertaking of the underwriter to indemnify him to the amount specified continues throughout the term of the insurance; and he may therefore be charged for the amount of a partial as well as of a subsequent total loss, although the amount of the two sums, which he is thereby obliged to pay, exceeds the amount named in the policy. This was judicially stated to be the law, as long ago as 1810, in this Commonwealth and in England.

In *Wood v. Lincoln & Kennebeck Ins. Co.*, 6 Mass. 479, 486, in which a vessel, insured by a time policy, was held to be partially lost by stranding, Chief Justice PARSONS said: "If the plaintiff had afterward employed her within the policy, and she had incurred a subsequent loss, total or partial, the defendants would have been holden to pay it, in addition to the partial loss with which they are chargeable by the stranding in question."

In *Livie v. Janson*, 12 East, 648, 655, decided in the same year, Lord ELLENBOROUGH said: "There may be cases in which though a prior damage be followed by a total loss, the assured may nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss. Actual disbursements for repairs in fact made, in consequence of injuries by perils of the seas prior to the happening of

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the total loss, are of this description ; unless indeed they are more properly to be considered as covered by that authority, with which the assured is generally invested by the policy, of 'suing, laboring and travelling, etc., for, in and about the defense, safeguard and recovery of the property insured' "— thus distinctly asserting that, even if the partial loss did not fall within the suing and laboring clause, the underwriters were liable for it .

In *Le Cheminant v. Pearson*, 4 Taunt. 367, 380, it was held, after advisement, that the underwriters were liable for the amount of a partial loss which had been repaired by the assured, as well as for a subsequent total loss within the policy ; and Sir JAMES MANSFIELD, C. J., said : " In practice I know of cases in the Court of King's Bench, where such expenses have been recovered as an average loss, without making any distinction whether it was recoverable as an average loss from damage repaired, or within the words of the permission to 'sue, labor and travail,' etc. ; and as no such distinction has been made, we find it safer to adhere to the practice which has obtained, and to call it all average damage."

It is implied by Chief Justice PARKER in *Rice v. Homer*, 12 Mass. 230, 235, and distinctly affirmed by Mr. Justice STORY in *Potter v. Providence Washington Ins. Co.*, 4 Mason, 298, 300, that if a partial loss or damage to the ship occurs in the course of a voyage, and afterward in the same voyage a total loss of the ship, and expenses have in the meantime been incurred to repair it, those expenses are payable by the underwriters, in addition to the total loss.

In *Brooks v. MacDonnell*, 1 Yo. & Col. Exch. 500, 515, Lord ABINGER, after observing that a policy of marine insurance was an instrument of indemnity, and that in all cases of total loss salvage belongs to the underwriter, and he pays all expenses, added : " It is also clear, that whenever the underwriter adjusts a partial loss, he still remains liable on the policy, and may go on paying partial losses exceeding, in the whole, cent per cent, and may ultimately have to pay a total loss of cent per cent."

In *Stewart v. Steele*, 5 Scott N. R. 927, it was implied throughout the case, and distinctly asserted by Mr. Justice MAULE, on pp. 941, 949, that if the partial loss had been repaired before the subsequent total loss, the underwriter was liable for the amount of both.

In that case, Mr. Justice MAULE stated that in *Blackett v. Royal Exchanges Assurance Co.*, 2 Cr. & Jerv. 244 ; S. C., 2 Tyrwh. 266, in which he was of counsel for the plaintiff, " the assured, having incurred expense to a considerable amount during the voyage and there being afterward a total loss, recovered £120 against an underwriter, who had sub-

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scribed £100 — for a partial, and a subsequent total loss — the £100 not being, like the penalty in a bond, the limit of the underwriter's liability, but the proportion of the loss he was liable for." 5 Scott N. R. 949.

The fact, appearing by the report of the case thus referred to, that Denman, Campbell and Follet, who were of counsel for the defendant, rested an unsuccessful defense to the claim of a partial loss upon other grounds, shows that the law upon this point was then generally understood to be well settled. And it is so treated in the principal English treatises on marine insurance. Park on Ins. (8th ed.) 221, 843, 844; Marshall on Ins. (5th ed.) 435; 2 Arnould on Ins. (2d ed.) 848, 986, 1193; Tudor's Lead. Merc. Cases (2d ed.) 216. See also 2 Parsons, Marit. Law, 272.

A rule recognized so long and so often, by such a weight of authority, and not contradicted or doubted by any judge in England or America for sixty years, is too firmly established to be shaken by the *obiter dicta* in the very recent case of *Lidgett v. Secretan*, L. R., 6 C. P. 616; the still later decision of the Commission of Appeals in *Alexandre v. Sun Ins. Co.*, 51 N. Y. 253; or the doubts expressed in 2 Phil. Ins. (4th ed.), § 1743. See also § 1267.

The early case of *Schmidt v. United Ins. Co.*, 1 Johns. 249, in which it was held that under a policy of insurance upon goods there could be no recovery, in addition to a total loss by blockade, for the amount of a previous general average loss by perils of the sea — unless it is to be supported on the ground suggested by Mr. Justice LIVINGSTON, on p. 264, that the general average loss must already have been paid by the consignee out of the proceeds of the goods, that is, out of a fund belonging to the defendants — is overruled by the later decision of the same court in *Barker v. Phoenix Ins. Co.*, 8 Johns. 307, 318.

We place no reliance upon the well-known usage of the underwriters of Boston, admitted in the case stated; because it does not appear to extend to Provincetown, where this policy was made; *Parkhurst v. Gloucester Ins. Co.*, 100 Mass. 301; S. C., 1 Am. Rep. 105; and because the reference in the policy to the rules and customs of insurance in Boston appears to have been inserted by way of designating the perils insured against, and not by way of regulating adjustments of losses. *Eager v. Atlas Ins. Co.*, 14 Pick. 141, 144.

Nor do we give any weight to the fact that the policy, so far at least as concerns the mode of computing the premium, resembles a time policy rather than a voyage policy; *Lovering v. Mercantile Ins. Co.*, 12 Pick. 848; because we do not find that any distinction as to the amount for

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which the underwriter may be liable in the two kinds of policies has been made in any of the authorities.

The ground of our decision is that by the general law of marine insurance, independently of any particular clause or local usage, the partial losses having been repaired before the total loss happened, and the latter as well as the former having occurred within the term of the policy, the underwriters were liable for both. *Judgment affirmed.*

KENDALL V. CITY OF BOSTON.

(118 Mass. 234.)

Negligence — evidence of.

The defendant, for the purpose of a concert, hired a public hall and employed a person to decorate it. Among the decorations was a bust placed on the outside of a balcony. The plaintiff sat in a seat on the floor of the hall immediately under the bust. The audience were requested, by the programme, to rise at a certain part of the concert, and when they did so the bust fell from its place and injured the plaintiff. The plaintiff offered no evidence as to the manner in which the bust was secured. *Held*, that the mere fact that the bust fell was not sufficient evidence to go to the jury of the defendant's negligence.

ACTIONS of tort for personal injuries sustained by the plaintiff at a concert given by the city to the Grand Duke Alexis on December 9, 1871.

The declaration in each case alleged that on or about the 9th day of December, 1871, the defendants were in the lawful use and occupation and had the possession and control of a certain building on Winter street in Boston, known as the Boston Music Hall; and for the purpose of ornamenting said building for an entertainment, had placed upon the walls thereof certain decorations, and among other things a certain statue or bust made of some heavy material; that on said day the plaintiff was present in said building upon the invitation and with the permission of the defendants, and while she was so rightfully therein, and was in the exercise of due care, said statue or bust fell upon her in consequence of the negligence and carelessness of the defendants, and she was thereby injured. Answer in each case: a general denial. Trial in this court, before ENDICOTT, J., who, after verdict, made a report of the cases to the full court, so much of which as relates to the point decided was as follows:

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The plaintiff contended that if the first action could not be maintained, the defendants in the second action were liable personally, they being members of the committee of arrangements appointed by the city authorities to extend the hospitalities of the city to the Grand Duke, and under whose direction the concert was given. The bill for the rent of the hall and that of the person who decorated it were paid by the city.

The plaintiff, having received from one of the city assessors a ticket, which was sent to her by the committee of arrangements, attended the concert, and sat in a seat assigned to her on the side of the hall, immediately under a bust of Franklin, which was attached or placed on the outside of the balcony above, and formed part of the decorations which had been put up for the occasion. As the audience rose when *Old Hundred* was sung, being requested so to do in the programme, the bust fell from its place, struck the plaintiff on her shoulder, and inflicted the injuries for which she seeks to recover damages. No evidence was offered in regard to the manner in which the bust was secured, but the fact that it fell was claimed to be sufficient evidence that it was negligently secured in its place.

At the close of the plaintiff's evidence, the judge ruled, on the defendants' motion, that the plaintiff could not maintain either action upon the evidence reported. Verdicts in each case were taken for the defendants. If the ruling was correct, judgments were to be entered on the verdicts; otherwise, the cases to stand for trial.

A. A. Ranney & R. M. Morse, Jr., for plaintiff.

J. P. Healy, for the defendants.

DEVENS, J. No evidence was offered as to the manner in which the bust had been attached to or placed upon the balcony, or as to whether it had been properly secured; but the plaintiff relied simply upon the fact that it fell, as evidence of negligence on the part of those whom she claimed to be responsible for the decoration of the hall.

Where a stage was overturned by the coming off of a wheel upon a smooth and level road, the evidence was held to be competent to show that the coach could not have been properly prepared for the road.

Ware v. Gay, 11 Pick. 106. So where a railway train ran from the track and was overturned, it was fairly presumable, as the machinery and railway track were exclusively in the management of the railway company, that the accident arose from its want of care, no explanation of the cause being offered. *Carpue v. London & Brighton Railway*, 5

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Q. B. 746; *Feital v. Middlesex Railroad*, 109 Mass. 398, 405; S. C., 12 Am. Rep. 720.

In *Kearney v. London, Brighton & South Coast Railway, L. R.*, 6 Q. B. 759, where the plaintiff was injured by the fall of a brick from the pier of a railway bridge of the defendant, there being no assignable cause except from the vibration produced by a train which had just before passed, and it appeared on examination that other bricks had fallen out, there was held to be evidence from which the jury might infer negligence. As in the case of the coach, above cited, the circumstances tended to show that it could not have been properly prepared for the road, so in that of the bridge they indicated that it was improperly constructed or negligently maintained.

In all these cases, it is to be observed that the defendant has been proved to have had the exclusive control and management of those objects or agencies from some defect in which the accident must have taken place.

In the present case, it is not shown whether the balcony was or was not occupied by the audience, whether those composing the audience or others did or did not rightfully have access to the place where the bust was put, and thus whether the fall may not have been occasioned by the wrongful or negligent act of some third person. It is not sufficient for the plaintiff to show that the injury may have been occasioned by the negligence of those whom he seeks to charge with it. If there were other causes which also might have produced it, he is in some way to show that these did not operate. Without some evidence as to the manner in which the bust was attached or secured, its fall alone did not furnish sufficient evidence of negligence.

In the view we have taken of the plaintiff's case, it is unnecessary to discuss what are the respective responsibilities of the defendants.

Judgments on the verdicts.

Ahrend v. Odiorne.

AHREND V. ODIORNE.

(118 Mass. 261.)

Vendor's lien. Statute of frauds — oral agreement to reconvey.

in Massachusetts the vendor of real estate by an absolute deed has no lien thereon for the unpaid purchase-money, in the absence of a written agreement of the parties to that effect.

An oral agreement by the vendee of land to reconvey it is within the statute of frauds, and where it appears in a bill for specific performance that the agreement was oral, the fact can be taken advantage of by demurrer.

BILL in equity, filed October 8, 1874, by Simon Ahrend against George F. Odiorne, Mary Louisa Stebbins and William Barnard, alleging the following facts:

In February, 1874, the defendant Odiorne and Retire C. Sturges represented to the plaintiff that certain persons were building a schooner for them in the State of Connecticut and they thereupon agreed with the plaintiff to cause said vessel to be built, finished and delivered to the plaintiff on or before August 1, 1874; and in consideration thereof the plaintiff agreed to convey to them two parcels of land in Boston (described in the bill) of the value of \$28,500, over and above certain mortgages. On February 7, 1874, the plaintiff, at their request, conveyed said parcels of land to Sturges and Odiorne, subject to certain mortgages, which the grantees agreed to pay.

On or about June 1, 1874, work on the schooner ceased, and it has since remained in an unfinished condition. Sturges and Odiorne, on or about said day, and repeatedly since, notified the plaintiff that they should be unable to build and deliver the schooner, and should not build and deliver it in accordance with their agreement; and that they would, if the plaintiff so requested, convey said parcels of land to him free from all incumbrances made or suffered by them. The plaintiff repeatedly requested them to convey the said parcels of land to him as they agreed; and Sturges on August 27, 1874, released and quit-claimed to the plaintiff one undivided half of said parcels of land, but the same was subject to incumbrances as hereinafter stated. Odiorne, though often requested, refused and neglected to convey to the plaintiff his one undivided half of said parcels.

On June 23, 1874, W. R. Burr brought an action against Odiorne, and caused his interest in said parcels of land to be attached to satisfy the judgment therein; and on August 7, 1874, Burr brought a second

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action against Odiorne, and caused the interest of Odiorne in said parcels of land to be attached to satisfy the judgment therein, and Odiorne has suffered these attachments to remain.

The defendant Stebbins is the sister of Odiorne, and she on July 15, 1874, at the request and for the benefit of Odiorne, and well knowing all the facts hereinbefore alleged, and that Sturges and Odiorne had received and retained the conveyance of the said parcels of land without having paid the consideration therefor, and that they intended not to pay the same, as the plaintiff is informed and believes, on July 15, 1874, at the request and for the benefit of Odiorne, brought a suit against Sturges and caused his interest in the two parcels of land to be attached, to satisfy the judgment in that action. Stebbins, as the plaintiff is informed and believes, then and there had no legal cause of action against Sturges, and knew all the facts hereinbefore stated. On July 31, 1874, Odiorne conveyed an undivided one-half interest in said parcels of land to Stebbins; which conveyance was without consideration; Stebbins then and there well knowing all the facts hereinbefore set forth, as the plaintiff is informed and believes, and the conveyance was in fraud of the rights of the plaintiff.

On August 6, 1874, Stebbins conveyed an undivided one-half interest in the land to the defendant Barnard; which conveyance was made without consideration; the defendant Barnard then and there well knowing all the facts hereinbefore set forth, as the plaintiff is informed and believes, and the conveyance was in fraud of the rights of the plaintiff.

The bill contained specific interrogatories to the defendants on the various matters alleged. The prayer of the bill was for an injunction restraining the defendants from making any conveyance of the land, or placing any incumbrance or suffering any incumbrance to be placed thereon; and that they be decreed to hold said undivided one-half interest in the land, subject to a lien in favor of the plaintiff for the value of the consideration agreed to be paid by Odiorne therefor, to convey to the plaintiff an undivided one-half interest in said lands free from all incumbrances made or suffered by them; that they be decreed to remove and discharge the attachment on the interest of Sturges in the lands made in the suit of Stebbins against Sturges; that a proper person be appointed to collect and receive the rents or other moneys from the undivided one-half interest in the lands, and for general relief.

The defendants demurred to the bill, and assigned the following grounds of demurrer: "1. That it appears by the bill that the plaintiff has a plain, adequate and complete remedy at law. 2. That the plaintiff has

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not by his bill made or stated a case which entitles him in equity to the relief or discovery prayed for."

The case was reserved, upon the bill and demurrer, by ENDICOTT, J., for the consideration of the full court.

S. H. Dudley & A. E. Pillsbury, for defendants.

R. M. Morse, Jr., for plaintiff

GRAY, C. J. The plaintiff principally relies upon the doctrine of the English courts of chancery that the vendor of real estate by an absolute deed has a lien thereon for the unpaid purchase-money, without proof of any agreement of the parties to that effect.

The earliest case which contains a full discussion of the doctrine, the source from which it is derived, and the reasons and authorities by which it is supported, is *Mackreth v. Symmons*, 15 Ves. 329, decided by Lord ELDON in 1808.

If, as the learned chancellor thought, "the doctrine is probably derived from the civil law as to goods," it is somewhat remarkable that it was never applied in England except to real estate. Adams on Eq. 127.

The only grounds upon which it has been rested are natural equity; a supposed intention of the parties; and a trust arising out of the unconscientiousness of the vendee's holding the land without paying the price.

It was forcibly argued by counsel in *Blackburne v. Gregson*, 1 Cox's Ch. 90, 100; S. C., 1 Bro. Ch. 420; and not answered by the court, "As to the general question of the lien, it is called a natural lien; but it certainly is not so with respect to personalty, which, if once delivered, it is conclusive, though concealed from all mankind; and there seems as much natural equity in the case of personalty as realty."

The presumption of an intention of the parties has been well disposed of by Chief Justice GIBSON: "The implication that there is an intention to reserve a lien for the purchase-money, in all cases in which the parties do not by express acts evince a contrary intention, is in almost every case inconsistent with the truth of the fact, and in all instances, without exception, in contradiction of the express terms of the contract, which purport to be a conveyance of every thing that can pass." *Kauffelt v. Bower*, 7 S. & R. 64, 76, 77.

The theory that a trust arises out of the unconscientiousness of the purchaser would construe the non-performance of every promise, made in consideration of a conveyance of property to the promisor, into a

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breach of trust; and would attach the trust, not merely to the purchase-money which he agreed to pay, but to the land which he never agreed to hold for the benefit of the supposed *cestui que trust*.

The earliest cases upon this subject in England were decided long since the settlement of Massachusetts; and in all those decided before our Revolution (except *Bond v. Kent*, 2 Vern. 281, in which the purchaser secured part of the purchase-money by mortgage and gave a note payable on demand for the rest, and it was held that the amount of the note was not a charge upon the land; and *Gibbons v. Baddall*, 2 Eq. Cas. Ab. 682, *note*, which is very briefly stated, without indicating when or by whom it was decided, in a volume called by Lord ELDON a "book of no very high character;" *Duffield v. Elwes*, 1 Bligh N. R. 497, 539), either the conveyance was retained in the custody of the vendor as security for the payment of the purchase-money, as in *Chapman v. Tanner*, 1 Vern. 267; *Pollexfen v. Moore*, 3 Atk. 272; *Fawell v. Heelis*, Ambl. 724, 726; *Coppin v. Coppin*, Sel. Cas. in Ch. 28; S. C., 2 P. Wms. 291; or the statements of the general doctrine were *obiter dicta*, as in *Harrison v. Southcote*, 2 Ves. Sen. 389, 393; *Walker v. Preswick*, id. 622; *Burgess v. Wheate*, 1 W. Bl. 123, 150; S. C., 1 Eden, 177, 211.

Lord ELDON himself, in *Mackreth v. Symmons*, said: "It has always struck me, considering this subject, that it would have been better at once to have held that the lien should exist in no case, and the seller should suffer for the consequences of his want of caution; or to have laid down the rule the other way so distinctly that a purchaser might be able to know, without the judgment of a court, in what cases it would, and in what it would not exist." 15 Ves. 340. But he felt himself obliged to declare, as the result of all the authorities, that it was clear that different judges would have determined the same case differently; that if some of the cases, that had been determined, had come before himself, he should not have been satisfied that the conclusion was right; and that it was "obvious that a vendor taking a security, unless by evidence, manifest intention or declaration plain, he shows his purpose, cannot know the situation in which he stands, without the judgment of a court how far that security does contain the evidence, manifest intention or declaration upon that point." 15 Ves. 342.

So Mr. Justice STORY, in *Gilman v. Brown*, 1 Mason, 191, 221, 222, upon a review of the English cases, concluded that the right of the vendor was not "an equitable estate in the land itself, although sometimes that appellation is loosely applied to it;" but "a right which has no existence, until it is established by the decree of a court in the particular case, and is then made subservient to all the other

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equities between the parties, and enforced in its own peculiar manner and upon its own peculiar principles."

The most plausible foundation of the English doctrine would seem to be that justice required that the vendor should be enabled by some form of judicial process to charge the land in the hands of the vendee as security for the unpaid purchase-money. And the restriction of the doctrine to real estate suggests the inference that the Court of Chancery was induced to interpose by the consideration that by the law of England real estate could neither be attached on *mesne* process, nor, except in certain cases, or to a limited extent, taken in execution for debt. 2 Bl. Com. 160, 161 ; 4 Kent's Com. (12th ed.) 428, 429.

By an act of Parliament, passed in 1732, lands, and other real estate within the English colonies were made chargeable with debts and subject to like process of execution as personal property. Stat. 5 Geo. II, ch. 7, § 4. And in Massachusetts lands had been made subject to attachment, as well as execution, by successive statutes of the Colony and Province, reaching back almost to the time of the first settlement. Col. Stats. 1644, 1647 ; 2 Mass. Col. Rec. 80, 204 ; Mass. Col. Laws (ed. 1672), 7, 104 ; Prov. Stat. 1696 (8 W. III.) ch. 10 ; 1 Mass. Prov. Laws (State ed.), 254 ; Anc. Chart. 49, 154, 155, 292 ; 5 Dane's Abr. 23. There is much less reason therefore for adopting the doctrine in this Commonwealth than in England. *Womble v. Battle*, 3 Ired. Eq. 182 ; *Wragg v. Comptroller-General*, 2 Desaus. 509.

In *Gilman v. Brown*, 1 Mason, 191, 219, Mr. Justice STORY said : " Nothing can be clearer than that by the law of Massachusetts no lien in any case whatever exists upon land for the purchase-money." In the argument of the same case on appeal, this was admitted on both sides ; *Brown v. Gilman*, 4 Wheat. 255, 264, 273 ; and the Supreme Court, in the opinion delivered by Chief Justice MARSHALL, expressed no doubt upon that point. Mr. DANE also says that no such lien exists in Massachusetts. 9 Dane's Abr. 159.

It is true that in their time this court had a very limited jurisdiction in chancery. But ever since 1836 it has been vested with full equity jurisdiction over all trusts, express or implied. Rev. Stats., ch. 81, § 8, and commissioners' notes ; *Wright v. Dane*, 22 Pick. 55 ; Gen. Stats., ch. 113, § 2. During this period of almost forty years, only two attempts have been made to invoke the exercise of this jurisdiction in cases at all analogous to the present. In *Wright v. Dane*, 5 Metc. 485, 503, the general question of vendor's lien was argued ; but as the facts of the case showed an express trust, it was not decided. But the opinion of

the court in *Hunt v. Moore*, 6 Cush. 1, 3, strongly tends to the conclusion that the failure of a purchaser of land to pay the consideration agreed could not create an implied or resulting trust. The suggestion, at the close of that opinion, that a court of full equity powers might perhaps afford the plaintiff relief, did not relate to the trust relied on, but to an allegation of fraud, of which, as a distinct head of equity jurisdiction, this court had no cognizance until the passage of the Stat. of 1855, ch. 194.

The English doctrine of vendor's lien has been adjudged not to exist in Maine. *Philbrook v. Delano*, 29 Me. 410, 415. And it does not appear to have been ever adopted in any of the New England States, except Vermont, in which, after being affirmed by the court, it has been abolished by the legislature. *Arlin v. Brown*, 44 N. H. 102; *Perry v. Grant*, 10 R. I. 334; *Dean v. Dean*, 6 Conn. 285; *Atwood v. Vincent*, 17 id. 575; *Manly v. Slason*, 21 Vt. 271; Stat. of Vt. of 1851, ch. 47; Gen. Stats. of Vt. of 1862, ch. 65, § 33.

In *Brown v. Gilman*, 4 Wheat. 255, 290, Chief Justice MARSHALL treated the question as governed by the consideration whether the doctrine had been adopted by the law of the particular State. And the doctrine has never been affirmed by the Supreme Court of the United States except where established by the local law, as for instance, in Ohio, *Bayley v. Greenleaf*, 7 Wheat. 46; *Tiernan v. Beam*, 2 Ohio, 383; in Georgia *M'Lean v. M'Lellan*, 10 Pet. 625, 640; *Harden v. Miller*, Dudley, 120 and in the District of Columbia, *Chilton v. Brand*, 2 Black, 458; the doctrine having been previously affirmed in the States of Maryland and Virginia, out of which the district had been formed; *Moreton v. Harrison*, 1 Bland, 491; *Redford v. Gibson*, 12 Leigh, 332; although it has since been abolished in Virginia by statute. *Yancey v. Mauck*, 15 Gratt. 300.

The decisions in the courts of those and many other States in favor of the doctrine, which are collected in the notes to 2 Sugden on Vendors (8th Am. ed.), ch. 19, suggest no reasons and afford no grounds why we should now for the first time adopt in this Commonwealth a doctrine which has never been supposed by the profession to be in force here; which would introduce a new exception to the statute of frauds; which, as experience elsewhere has shown, tends to promote uncertainty and litigation; and which appears to us to be unfounded in principle, unsuitable to our condition and usages, and unnecessary to secure the just rights of the parties. If no third person has acquired any rights in the land by *bona fide* attachment or conveyance, the original vendor may secure payment of the debt due him for the purchase-money by the usual attachment on *mense* process. If any third person has acquired rights in the

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property, there is no reason why equity, any more than the common law should interpose to defeat them.

It may be doubted whether, upon the case stated in the bill, the plaintiff would be held entitled to the lien which he asserts, in those courts which recognize the existence of a vendor's lien for unpaid purchase-money. 1 Perry on Trusts, § 235. But as we are clearly of opinion that no such lien exists in this Commonwealth in any case without agreement in writing, we do not propose to entangle ourselves in the refinements and embarrassments which are inseparable from its judicial consideration and affirmance.

The plaintiff further contends that his bill may be maintained for specific performance of a subsequent agreement to reconvey the land. But if that agreement was oral, it was within the statute of frauds, and could not be enforced either at law or in equity. *Glass v. Hulbert*, 102 Mass. 24 ; S. C., 3 Am. Rep. 418. The allegation relating to it — which is merely that the defendants on a certain day and repeatedly since notified the plaintiff that they would, if he requested it, reconvey the land to him — clearly implies that the agreement was oral ; and this fact, thus appearing upon the face of the bill, may be taken advantage of by demurrer. *Walker v. Locke*, 5 Cush. 90 ; *Slack v. Black*, 109 Mass. 496 ; *Farnham v. Clements*, 51 Me. 426 ; *Randall v. Howard*, 2 Black, 585.

The bill cannot be maintained on the ground of fraud ; because it alleges none in the original conveyance. The mere non-performance of the subsequent and distinct agreement, which is within the statute of frauds, does not constitute a fraud. *Campbell v. Dearborn*, 109 Mass. 130, 140 ; *Brightman v. Hicks*, 108 id. 246. And for the fraud alleged in the attachment by and conveyance to the defendant Stebbins, as well as for the non-performance of the agreement to deliver the vessel, the plaintiff has an adequate and complete remedy at law. *Jones v. Newhall*, 115 Mass. 244 ; *Suter v. Matthews*, id. 253.

The bill cannot be maintained for discovery ; because it is not shown that the discovery for which it prays is any thing but incidental to the relief sought or could not be had by interrogatories in an action at law *Pool v. Lloyd*, 5 Metc. 525 ; *Ward v. Peck*, 114 Mass. 121.

Demurrer sustained and bill dismissed.

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CLARK v. BURNS.

(118 Mass. 275.)

Carrier — not liable as innkeeper.

The owner of a steamship carrying passengers for hire is not an innkeeper, although the passenger pays a round sum for transportation, board and lodging.

The owner of a steamship is not liable as a common carrier, for a watch worn by a passenger on his person by day and kept by him within reach at night, whether retained upon his person, or placed under his pillow, or in a pocket of his clothing hanging near him.

In an action against a common carrier of passengers for the loss of a watch stolen from the state-room of a passenger in the night time, the case was submitted on agreed facts to the judgment of the Superior Court, which ruled that the plaintiff could not maintain his action, and gave judgment for the defendant. *Held*, that the question, whether upon the facts the inference could be properly drawn that the defendant was guilty of negligence, was not open to the plaintiff upon a bill of exceptions. (*See note*, p. 458.)

CONTRACT, for the value of a watch, against the owners of a steamship as common carriers, with counts in tort for negligence, and also counts charging them as innkeepers. The case was submitted to the Superior Court on an agreed statement of facts in substance as follows :

The defendants are the owners of the Cunard line of steamers, so called, which run between Boston and Liverpool, and New York and Liverpool, and are common carriers of passengers and freight between those places. On November 28, 1871, the plaintiff left Liverpool on board the steamship *Calabria*, one of the Cunard line, for New York, as a first-class passenger. The plaintiff paid for his ticket, by which he became entitled to the usual accommodation on board the ship for sleeping and lodging, and to be supplied with proper food. He took with him and wore on his person in the daytime the watch referred to in the declaration. He occupied a state-room with two berths, one of which was occupied by another passenger, placed there by the defendants, and it is admitted that the watch was not taken by him. The state-room had a lock, but no key or other fastening. When the plaintiff went to bed on Sunday evening, December 3, at nine o'clock, he put his watch in the pocket made for it in his waistcoat which he hung by the arm-holes on a hook in his state room, intended for clothes to be hung on. He did not fasten his state-room door, having no means to do so. The lamp in the state-room was so placed that the steward had to come into the state-room and go to the farther end thereof to light it and to put the light out, and was in the habit of doing so at the time appointed, by the rules and

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regulations of the ship, for lighting the lamps and putting out the lights. Passengers are not allowed to light or put out the lamps. The lamps are put out at ten o'clock, P. M. When the plaintiff first arose to dress himself at the usual hour on Monday morning his watch was missing. He notified the captain immediately of his loss, and the purser made a thorough search of the state-room, and then a careful examination of the plaintiff's trunk and the trunk of the gentleman who occupied the other berth in the state-room, but without success.

The plaintiff had the usual accommodations given to first-class passengers on board the defendants' steamers, and it is the usual custom of the defendants not to permit the locking of state-room doors, nor to permit passengers to control the lamps in their state-rooms or the windows thereof, but to give the stewards access at all times to the state-rooms in order that passengers may not, by the use of matches, or by imprudently opening their windows, incur the risk to themselves, their fellow-passengers and the ship and cargo, of fire, and of the entrance of water through the windows, and also that they may be accessible in case of accident or danger, or of their own helplessness from sickness or other causes.

When the plaintiff reached Boston he called on the defendants' agent, Mr. Alexander, of whom he purchased his ticket, and requested of him payment for the loss sustained by him, and at the same time complained that the state-rooms were not allowed to be locked, to which Alexander replied, giving as a reason for the rule, that the state-rooms must be accessible for the safety of the ship, cargo and passengers. The plaintiff had crossed the ocean three times before in boats of the Cunard line and had never had a key or fastening to his state-room, and understood that it was against the rule or custom of these ships. The watch was worth one hundred and twenty-five dollars. The pleadings may be referred to.

If, upon the foregoing facts the plaintiff was entitled to recover, judgment was to be rendered for \$125, and interest from date of the writ, with costs; otherwise judgment for the defendants, with costs.

Upon the facts agreed, BRIGHAM, C. J., ruled that the plaintiff could not maintain this action, and ordered judgment for the defendants; and the plaintiff alleged exceptions.

C. A. Welch, for plaintiff.

W. G. Russell, for defendants.

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GRAY, C. J. The liabilities of common carriers and innkeepers, though similar, are distinct. No one is subject to both liabilities at the same time, and with regard to the same property. The liability of an innkeeper extends only to goods put in his charge as keeper of a public house, and does not attach to a carrier who has no house and is engaged only in the business of transportation. The defendants, as owners of steamboats carrying passengers and goods for hire, were not innkeepers. They would be subject to the liability of common carriers for the baggage of passengers in their custody, and might perhaps be so liable for a watch of the passenger locked up in his trunk with other baggage. But a watch, worn by a passenger on his person by day, and kept by him within reach for use at night, whether retained upon his person, or placed under his pillow, or in a pocket of his clothing hanging near him, is not so intrusted to their custody and control as to make them liable for it as common carriers. *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. 302; *Tower v. Utica Railroad*, 7 Hill, 47; *Abbott v. Bradstreet*, 55 Me. 530; *Pullman Palace Car Co. v. Smith*, 7 Chicago Legal News, 237.

Whether the defendants' regulations as to keeping the doors of the state-rooms unlocked, the want of precautions against theft, and the other facts agreed, were sufficient to show negligence on the part of the defendants, was taking the most favorable view for the plaintiff, a question of fact, upon which the decision of the court below was conclusive. *Fox v. Adams Express Co.*, 116 Mass. 292.

Exceptions overruled.

NOTE.—The kindred question as to the liability of the owners of "palace," "drawing room" and sleeping cars has been several times before the courts. In *Welch v. The Pullman Palace Car Co.*, 17 Abb. (N. S.) 352, it was held that when a passenger in a sleeping car went to bed and placed his overcoat in a vacant berth over that in which he slept he could not recover for its loss; so in *Palmer v. Wagner*, 11 Alb. L. J. 149, it was held by the Marine Court of New York that a sleeping car company was not an insurer or innkeeper, but was bound to use reasonable care to protect the passenger's property. The same was held by the United States Circuit Court for the Circuit in *Plum v. Pullman Sleeping Car Co.*, 13 Alb. L. J. 221.

In *Crozier v. Boston, etc., R. R. Co.*, 43 How. Pr. 466, it was held that a steamboat company is liable as a common carrier, to a passenger, for the loss of his pocket-book, money, watch and chain, retained by him upon his person and stolen in the night-time, from a state-room occupied by him, without his fault. It was held that the presumption in such a case is that the loss occurred through the default of the carrier; and also that a rule or notice posted up requiring a passenger to deliver his baggage to an officer of the boat would not be construed as applying to the occupants of state-rooms nor to baggage of the kind mentioned.—RKP.

Somerby v. Buntin.

SOMERBY V. BUNTIN.

(118 Mass. 279.)

Agreement as to letters patent — statute of frauds — specific performance — of oral agreements.

Plaintiff and defendant entered into an oral agreement whereby a certain invention of defendant's and all letters patent granted therefor should be their joint property. The plaintiff was to contribute the money to procure letters patent, and both were to use their best efforts to make the invention remunerative. In a suit for specific performance, *held*, (1) that the agreement was one of partnership and not void under the statute of frauds relating to the sale of goods, etc. ; (2) that it was not void as an agreement not to be performed within one year ; (3) that a court of equity had jurisdiction to enforce the contract, although oral, it not being within the statute of frauds and no adequate remedy being attainable in an action at law ; (4) that such an agreement, though made before the issue of a patent, is valid and enforceable in equity by compelling an assignment, an accounting and such other relief as the circumstances of the case may require.

BILL in equity filed January 9, 1872, by John P. Somerby and Jeremiah Prescott, alleging substantially the following facts :

The defendant, in the year 1865 and 1866, invented a new and useful improvement in seats for railroad passenger cars, and, being desirous to obtain letters patent therefor, or otherwise to so use or dispose of his invention as to realize money therefrom, applied to the plaintiffs for assistance in both of these respects, and offered the plaintiffs each one-third part of the property in the invention, and of all moneys and emoluments which should result therefrom, as compensation for affording him the solicited assistance. The plaintiffs accepted the said offer of the defendant ; and an oral agreement was made between the parties that the invention, by which all letters patent which should be granted therefor, should be the joint property of the plaintiffs and the defendant, each to be the owner of one-third part thereof, and that each and all of the parties should use his best efforts to make said invention available and remunerative for the common benefit of all the parties. In pursuance of this agreement, application was made in the name of Buntin for letters patent of the United States, and the expenses of making and prosecuting the application were paid by Somerby, and sales of the right to use the invention were made principally through the agency of Prescott, from which sales divers sums of money were received, which were divided between Buntin and the plaintiffs in the proportion of one-third part to each, in pursuance of the agreement. The invention was rapidly advancing in public favor, chiefly through the labor, expenditures and ex

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ventions of the plaintiffs, and the sales of rights to use the same were increasing in a similar ratio, so that the proceeds of the sales had become large and were steadily augmenting, and would have yielded to the plaintiffs a large income for their time, labor and expenditures in the premises, but that the defendant early in the year 1867, while the aforesaid application to the United States for letters patent was pending, and without the knowledge or consent of the plaintiffs, or either of them, made application to the United States for letters patent in his name, and in another form, for the said invention, on which application letters patent were granted to him, on or about April 2, 1867, for a "design for end frame of a car seat," which was the invention of the defendant that had become the property of the defendant and the plaintiffs. Upon the receipt of the said letters patent by the defendant, he refused to assign any part thereof to the plaintiffs, and denied that they had any right therein or in the invention, or in the proceeds thereof, and proceeded to make large sales of rights to use the invention under the letters patent, and has received therefrom divers large sums of money for which he refuses to render any account to the plaintiffs, or to make any division thereof with them, and pretends that all said sums of money belong to him, and that the plaintiffs, or either of them, have no property or right therein.

The prayer of the bill was that the defendant might be restrained from making any sale or assignment of the said letters patent, or of the invention, to any person or persons other than the plaintiffs without their consent; that he be compelled to assign and transfer to each of the plaintiffs one-third part of said letters patent and invention; for an account of all sums of money and of all other considerations received by him for sales under said letters patent or for licenses to use the invention; and the payment to each of the plaintiffs of such sums of money and other considerations as should be found to be due to them respectively; and for general relief.

The defendant demurred to the bill upon the grounds which appear in the opinion. The case was heard by GRAY, C. J., upon the bill and demurrer, and reserved, at the request of the parties, for the consideration and determination of the full court.

T. L. Livermore, for defendant.

J. P. Healy, for plaintiff.

GRAY, C. J. The causes assigned in the demurrer are, 1st, that the

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contract sought to be enforced is not in writing ; 2d, that it is against the course and practice, and not within the jurisdiction of this court, to entertain suits for the specific performance of oral contracts ; 3d, that the plaintiffs have not stated such a case as entitles them to any discovery or relief in equity.

1. In support of the first cause assigned, the defendant relies on the section of the statute of frauds relating to the sale of goods, wares or merchandise ; Gen. Stats., ch. 105, § 5 ; and also on the clause of the same statute relating to agreements not to be performed within one year from the making thereof. § 1, cl. 5.

It was held by the Court of Chancery in England, before the American Revolution, that shares in a corporation were goods, wares and merchandise within the statute of frauds. *Mussel v. Cooke*, Pre. Ch. 533 ; *Crull v. Dodson*, Sel. Cas. in Ch. 41. And it has been held by this court that such shares, and even promissory notes, fall within the statute. *Tisdale v. Harris*, 20 Pick. 9 ; *Baldwin v. Williams*, 3 Metc. 365. But the modern decisions in England are the other way, and the decisions in other States are at variance. Browne on Stat. of Frauds, §§ 296, 298 ; 1 Chit. on Cont. (11th Am. ed.) 541, *note*. The words of the statute have never yet been extended by any court beyond securities which are subjects of common sale and barter, and which have a visible and palpable form. To include in them an incorporeal right of franchise, granted by the government, securing to the inventor and his assigns the exclusive right to make, use and vend the article patented ; or a share in that right, which has no separate or distinct existence at law until created by the instrument of assignment, would be unreasonably to extend the meaning and effect of words which have already been carried quite far enough. See *Chanter v. Dickinson*, 6 Scott N. R. 182 ; S. C., 5 Man. & Gr. 253.

But it is not necessary in this case to go so far as to say that a sale of letters patent for an invention is not within the statute of frauds. Before letters patent are obtained, the invention exists only in right, and neither that right, nor any evidence of it, has any outward form which is capable of being transferred or delivered *in specie*, or which, upon any construction, however liberal, can be considered as goods, wares or merchandise. So far as regarded the letters patent when obtained, the contract between the parties in this case was not a contract of sale, but a contract of partnership, which would be equally valid whether written or oral. Story on Part., § 86 ; 1 Lindley on Part. (3d ed.) 89. According to the contract alleged, the defendant was to contribute to the proposed partnership his inchoate right in the invention ; the plaintiffs were to

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contribute the money necessary to make that invention available in the form of a patent ; and both were to contribute their services to make it remunerative. The patent, when obtained, was therefore not the result of the efforts, the service or the money of one partner, but of the joint contribution of all, and was in equity partnership property, in whosoever name letters patent were taken out. 3 Kent's Com. (12th ed.) 24-26 ; *Green v. Beesley*, 2 Scott, 164 ; S. C., 2 Bing. N. C. 108 ; *Sims v. Wilkin*, 8 S. & R. 103 ; *Musier v. Trumbour*, 5 Wend. 274 ; *Duryea v. Whitcomb*, 31 Vt. 395 ; *Dyer v. Clark*, 5 Metc. 562 ; *Fall River Whaling Co. v. Borden*, 10 Cush. 458 ; *Bulfinch v. Winchenbach*, 3 Allen, 161.

We are therefore of opinion that the contract set up in the bill was not an agreement for the sale of goods, wares or merchandise, within the statute of frauds.

The agreement to obtain letters patent might be performed within a year, and it does not appear by this bill that all the efforts required of either party, to make the invention available and remunerative for the common benefit, might not also be exerted within that time. As it does not appear that the contract could not be performed within a year, it does not fall within the statute of frauds. *Blake v. Cole*, 22 Pick. 97 ; *Doyle v. Dixon*, 97 Mass. 208 ; Browne on Stat. of Frauds, §§ 272-282. It may be doubted whether the case of *Packet Co. v. Sickles*, 5 Wall. 580, cited by the defendant, in which an oral contract to pay, for a right to use an invention on a certain steamboat, so much a year during the term of a patent having twelve years yet to run, "if the said boat should last so long," was held to be within the statute, can be reconciled with the general current of authority in this Commonwealth and elsewhere ; but it is quite unlike this case, in which it does not appear that the parties contemplated that the time for the performance of their contract should exceed a year.

2. It is now well settled that the jurisdiction of courts of equity to decree specific performance is not confined to contracts for the sale of land, but may be exercised, upon sufficient cause shown, over agreements for the transfer of interests in personal property or patent rights. 1 Story's Eq. Jur., ch. 18 ; *Clark v. Flint*, 22 Pick. 231, 239 ; *Leach v. Fobes*, 11 Gray, 506, 510 ; *Todd v. Taft*, 7 Allen, 371 ; *Binney v. Annan*, 107 Mass. 94 ; *Corbin v. Tracy*, 34 Conn. 325. Even oral contracts will be specifically enforced, when the case is not within the statute of frauds, and no complete and adequate remedy can be had by an action at law. *Holt v. Nettervill*, 2 P. Wms. 304 ; *Clifford v. Turrell*, 1 Yo. & Col. Ch. 38 ; *Duncuft v. Albrecht*, 12 Sim. 189 ; *Union Ins. Co. v. Commercial Ins. Co.*, 2 Curtis, 524 ; S. C., 19 How. 318 ; *Glass v. Hulbert*, 102 Mass. 24, 33.

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Under the Revised Statutes, indeed, the equity jurisdiction of this court to decree specific performance was confined to written contracts. Rev. Stats., ch. 74, § 8 ; ch. 81, § 8. But by the Stat. of 1857, ch. 214, the legislature conferred upon this court " full equity jurisdiction, according to the usage and practice of courts of chancery, in all cases where there is not a full, adequate and complete remedy at law." The reënactment of this statute in the Gen. Stats., ch. 113, § 2, is not to be limited in effect by reason of its being accompanied by a reënactment of the more restricted provisions of the Revised Statutes and of the successive statutes by which our equity jurisdiction had been from time to time extended.

The oral agreement of the parties, alleged in the bill, that the invention and all letters patent which should be granted therefor should be their joint property, in proportions specified, stands upon the same ground as if it had been in writing. Such an agreement, though made before the issue of a patent, is valid, and capable of being enforced in equity by compelling an assignment, an account and such other relief as the circumstances of the case may require. *Herbert v. Adams*, 4 Mason, 15 ; *Nesmith v. Calvert*, 1 Woodb. & Min. 34 ; *Clum v. Brewer*, 2 Curtis, 506 ; *Binney v. Annan*, 107 Mass. 94. Although a court of equity will not ordinarily decree specific performance of an agreement to form a partnership which may be immediately dissolved by either party, it will secure to a partner the interests in property to which by the partnership agreement he is entitled. *Buxton v. Lister*, 3 Atk. 383 ; Story on Part., § 189 ; 1 Story's Eq. Jur., § 666.

The bill sufficiently alleges that the plaintiffs performed the agreement on their part, and that the profits received before the issue of the patent were duly divided between the parties. It is not alleged, and is not to be presumed, that the plaintiffs have received any profits, for which they are bound to account, since the defendant procured the patent to be issued in his own name alone.

For these reasons, none of the causes of demurrer assigned afford any ground for refusing to entertain jurisdiction of the bill. The objection of laches was not taken in the demurrer filed, nor assigned *ore tenus* at the hearing before a single justice. It is therefore not open to the defendant

Demurrer overruled.

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RUSS V. ALPAUGH.

(118 Mass. 369.)

Deed — when heir not bound by covenants of ancestor — estoppel.

A tenant by the curtesy conveyed the land in fee with full covenants of warranty and afterward died leaving assets equal to the land. *Held*, (1) that his children were not estopped by the deed to assert their title to the land by inheritance from the mother ; and (2) that they were not liable to a personal action upon the covenants of the deed unless administration has been taken out and a breach occurs after the estate has been settled.

W RIT of entry by George W. Russ, Caroline E. Newcomb and Susannah S. Young, the heirs at law of Caroline Newcomb, deceased, intestate, to recover a lot of land in Quincy. Plea, *nul disseisin*. The case was submitted to the judgment of the Superior Court, and of this court on appeal, upon the following facts :

In 1845, Jonathan Baxter, being seised and possessed of the demanded premises, together with other lands in Quincy, died intestate, leaving as his heirs at law five children, among them a daughter Caroline (under whom the demandants claimed), then married to James Newcomb. A division of his estate was effected by agreement among his heirs, and the demanded premises were included in the portion allotted to and accepted as her share by the daughter Caroline ; and the other four heirs executed a quit-claim deed to James Newcomb, her husband, of all their right, title, interest and estate in the demanded premises, describing them, dated April 23, 1846, and duly acknowledged and recorded, for a nominal consideration of \$690.60 ; but in fact James Newcomb paid no consideration whatever for that release, and the real consideration for the same was the execution by said Caroline of several releases, to the other four heirs, of all her right, title, interest and estate in the other lands of which her father had died seised and possessed as aforesaid, which, by the said agreement among his heirs, had been severally allotted to and accepted by them for their shares of his estate.

On August 10, 1857, James Newcomb conveyed the demanded premises by deed of warranty to George Newcomb, who conveyed the same by quit-claim deed of the same date to Caroline, wife of James Newcomb.

On January 8, 1858, Caroline Newcomb died, never having made any conveyance of the demanded premises, or of any interest therein, and leaving her husband surviving her, and the demandants, her children and only heirs at law. The demandants, Caroline E. Newcomb and Susan

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nah S. Young, are children of Caroline Newcomb by her said husband, James Newcomb, and the demandant Russ is a child of Caroline Newcomb by a former husband.

On January 20, 1858, James Newcomb, being in possession of the demanded premises as tenant by the curtesy, executed a mortgage, which was duly acknowledged and recorded (under a foreclosure of which and various *mesne* conveyances, none of which are in controversy, the tenant claims title), of the lands in question with full covenants of warranty.

On February 15, 1870, James Newcomb, having in the meantime married again, died, leaving a widow surviving him, and as his heirs at law the said Caroline E. Newcomb and Susannah S. Young, daughters by said Caroline Newcomb, and two other children by other wives, and leaving assets of equal value at that time with the demanded premises, which descended to his said heirs, subject to the widow's dower.

The case was argued in January, 1875, and reargued in March, 1875.

L. S. Dabney, for demandants.

J. Q. Adams & B. Adams, for tenant.

GRAY, C. J.* 2. By our law, it is well settled that a deed with full covenants of warranty estops the grantor to set up any title subsequently acquired by him against the grantee, and that the subsequently acquired title inures by virtue of the estoppel to the grantee, at least at the election of the latter. *Somes v. Skinner*, 3 Pick. 52; *Blanchard v. Ellis*, 1 Gray, 195; *Carver v. Jackson*, 4 Pet. 1, 85-87; *Irvine v. Irvine*, 9 Wall. 617. The deed works by way of estoppel as well as by way of contract, and therefore has effect as an estoppel, without regard to the grantor's liability to a personal action on the covenants, and even if he has obtained a discharge in bankruptcy before acquiring the subsequent title. *Gibbs v. Thayer*, 6 Cush. 30; *Bush v. Cooper*, 18 How. 82. Any one claiming title by inheritance from the grantor after he has acquired the subsequent

* The learned Chief Justice first considered at length the English doctrine of lineal and collateral warranty and concluded "The result on this branch of the case is, that if the English doctrine of rebutter by collateral warranty is any part of the law of this Commonwealth (which we have no occasion now to decide), it is only as restricted by the Stat. of Anne (4 & 5 Anne, c. 16, § 21); and that the deed of James Newcomb, he having at the time of its execution only an estate by the curtesy, and no estate of inheritance in possession, did not operate by way of collateral warranty to bar his heirs, even to the extent of the assets which they took by descent from him." As that portion of the opinion is rather of historical than of practical value we omit it.

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title is of course equally bound by the estoppel. *Carver v. Jackson*, *ubi supra*; *French v. Spencer*, 21 How. 228; *White v. Patten*, 24 Pick. 324; *Perry v. Kline*, 12 Cush. 118; *Wark v. Willard*, 13 N. H. 389. And a release with covenants of warranty by an heir apparent, of his estate in expectancy, will bar his claim by descent on the death of his ancestor. *Trull v. Eastman*, 3 Metc. 121; *Curtis v. Curtis*, 40 Me. 24.

But we are not aware of any case in which it has been adjudged that an heir, claiming an independent title in himself, is estopped to assert it by the mere force of the covenants of his ancestor. And whatever may be the true foundation or reason of the rule, it cannot be allowed such an effect.

If it rests upon the common-law doctrine of estoppel, "an estoppel on the part of the mother shall not bind the heir when he claimeth from the father;" Co. Lit. 365, *b*; and of course, *e converso*, the estoppel of the father cannot bind the heir claiming an independent title from the mother.

If, as is implied in *Somes v. Skinner*, 3 Pick. 59, and *White v. Patten*, 24 id. 327, it rests on the rule of law, declared in *Weale v. Lower*, Pollexf. 54, 66, that if a conveyance is made by fine, of an estate which is contingent when the fine is levied and afterward becomes absolute, "the estate which cometh to the heir upon the happening of the contingency feeds this estoppel, and then the estate by estoppe becometh an estate in interest, and shall be of the same effect as if the contingency had happened before the fine levied," that rule does not extend to an heir claiming under an independent title. "If the father is tenant for life, remainder to the son in fee, and he levies a fine, that shall not bind the son as privy for his reversion; or if the father levies a fine of the lands of the mother, the son is not bound;" and so he is not bound as heir, if he claims the land by descent from another ancestor, although he must name the person by whom the fine was levied, by way of pedigree and not of title. *Edwards v. Rogers*, W. Jones, 456, 460; S. C., March, 94; 2 Prest. Abstr. Tit. 215, 216.

So far as it is governed by the law of common recoveries, as is implied in *Somes v. Skinner*, 3 Pick. 58, 59, the effect of a common recovery depended upon the fact that the party, who by reason thereof lost his estate, was recompensed by a recovery in value under the voucher to warranty. Rawle on Cov. (4th ed.) 9, 414. And the recovery bound no one, even by way of estoppel, who was not a party to it, but claimed under an independent title, as appears by the very case cited in 3 Pick. 58, 59, from Rolle's Abridgment, and by *Say & Seal's case*, 10 Mod. 40, 45.

So far as it rests, as stated by Mr. Justice WILDE in *Comstock v. Smith*, 13 Pick. 116, 119, and by Mr. Justice NELSON in delivering the opinion

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of the Supreme Court of the United States in *Van Rensselaer v. Kearney*, 11 How. 297, 322-326, upon the ground that a person shall not be permitted to allege a fact to be different from what he has expressly asserted it to be in his own deed, there is no reason for extending it to any one claiming under a title independent of the grantor and existing in another person before the title accrued from the grantor.

To allow the doctrine of estoppel such operation would be to deprive a rightful owner of his estate, without any act or covenant of his own, merely by reason of his happening to become heir to one who, having no title, had undertaken to assert one; and, as this doctrine depends upon the terms of the deed and the relation of the heir to the grantor and to the estate granted, wholly independently of the question whether he has or has not inherited other assets from him, would bind him even if he took no such assets, and thus introduce into our jurisprudence the most odious and unjust rules of the English law of collateral warranty.

The general statement of Chief Justice SHAW, in delivering the opinion in *Cole v. Raymond*, 9 Gray, 217, 218, that when one granting lands in fee, with covenants of warranty binding himself and his heirs, has no title to the estate, "yet if he or they afterward acquire a good title, it forthwith inures to the benefit of the grantee, to the same extent as if the grantor and warrantor had had the same good title at the date of the grant and warranty, to operate by way of estoppel, if the action be brought in such form that it may be pleaded by way of estoppel; otherwise by way of rebuttal to the claim of any one bound by such warranty." must be construed to intend, so far as the effect upon the heirs is concerned, the case in which they subsequently acquire a good title in the right of the grantor, for two reasons: 1st, as the heir in that case took no assets by descent from his father, the grantor, and claimed an independent title from his mother, to hold him bound by the warranty would directly contravene the St. of Gloucester; 2d, if the heir had been held bound by the mere force of the grant and covenant of his ancestor it would have disposed of the case; whereas the court expressly waived the decision of that question, and held the son and his grantee to be estopped by the deed, solely upon the ground that as executor and residuary devisee of his father he had given bond to pay all his father's debts and legacies, and thereby expressly taken upon himself the obligation of his father's warranty.

It follows that the demandants, not claiming title under their father, nor having assumed by their own act the obligation of his covenants, are not estopped by his deed to assert in this action their title by inheritance from their mother.

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3. By the law of England, the grantor was liable to an action on his express covenants, at least when his liability on the warranty was not an adequate remedy. 30 & 31 Edw. I, 255, 257; Rawle on Cov., 206-210, and notes. And the heir was liable to a personal action on the covenants of his ancestor so far; though so far only, as assets descended from the one to the other. *Buckley v. Nightingale*, 1 Stra. 665; *Brook v. Bulkeley*, 2 Ves. Sen. 498, 499; 2 Bl. Com. 243.

By the law of this Commonwealth, the lands, as well as the personal property, of a deceased person are liable for his debts, and the remedy of the creditors must ordinarily be sought by action against his executor or administrator, and sale of the real estate, if necessary, under license of court; and the heirs are not liable to a personal action upon his covenants, even if they have received assets, unless administration has been taken out and a breach occurs after the estate has been settled. *Royce v. Burrell*, 12 Mass. 395; *Hall v. Bumstead*, 20 Pick 2.

In *Bates v. Norcross*, 17 Pick. 14, the tenant claimed title to the demanded premises under a deed with general covenants of warranty from a father, whose only daughter and heir at law had received by descent from him assets in real estate to a greater value than the land demanded, and after his death, intermarried with the demandant, who now claimed the land under a paramount title. The only questions reserved were: 1st, whether the demandant, being in the right of his wife privy in estate with the grantor, was estopped to set up a title paramount against the tenant, in opposition to the grant and covenant; and 2d, whether, as the tenant, if the demandant were to recover in this action, would have his remedy by action of covenant on the warranty against the demandant and his wife, such warranty operated by way of rebutter to defeat and bar this action. The court, observing that the doctrine of collateral warranty was not applicable, held that the case was one of lineal warranty, so far as the daughter of the grantor was concerned, and that, her husband being jointly liable with her to action, judgment and execution on the covenant, the doctrine of rebutter applied, to avoid circuitry of action. It must be assumed that the estate of the grantor, who, it appears by the report, had died ten years before the trial, had been settled in due course of administration; for it is not to be supposed that the court intended to overrule the case of *Royce v. Burrell*, 12 Mass. 395, or to take a different view of the law from that which the same judges, who decided *Bates v. Norcross*, affirmed within a year afterward in *Hall v. Bumstead*, 20 Pick. 2.

In the case at bar, as it does not appear that administration has been taken out on the estate of James Newcomb, his heirs are not and have

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never been liable to a personal action on his covenants, and therefore those covenants cannot be set up against them by way of rebutter and to avoid circuity of action.

Judgment for the demandants.

COMMONWEALTH v. BULMAN.

(118 Mass. 456.)

Indictment — variance — “disorderly house.”

Under an indictment at common law for keeping a “disorderly house” it is no variance that defendant kept only a single room.

INDICTMENT for keeping a “certain common, ill-governed and disorderly house.” At the trial it appeared that defendant was the owner of the house referred to, but that he occupied only the lower story thereof during the time alleged, and that the upper stories were leased to and occupied by other parties.

The defendant requested the judge to instruct the jury that the indictment was not supported by proof that the defendant kept and occupied only a part of the house, the rest being held and occupied, as above stated, by another person : but the presiding judge refused. The defendant was found guilty, and alleged exceptions.

D. Aiken, for defendant.

C. R. Train, Attorney-General, for Commonwealth.

GRAY, C. J. Under an indictment at common law, such as this is, for keeping a disorderly house, it is no variance that the defendant kept only a single room. *Regina v. Peirson*, 1 Salk. 382 ; S. C., 2 Ld. Raym. 1197. The common law knows no such offense as keeping a “disorderly tenement.” *Commonwealth v. Wise*, 110 Mass. 181. The decision in *Commonwealth v. McCaughey*, 9 Gray, 296, was under a statute which prohibited the keeping of “all buildings, places or tenements,” used for certain unlawful purposes, and was thereby held to have made a distinction between “buildings” and “tenements.” Gen. Stats., ch. 87, § 6 ; *Commonwealth v. Godley*, 11 Gray, 454 ; *Commonwealth v. Shattuck*, 14 d. 23.

Exceptions overruled.

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BEMIS v. LEONARD.

(118 Mass. 502.)

Time — computation of.

In computing time from the date, or the day of the date, or from a certain act or event, the day of the date, act, or event is to be excluded, unless a different intention is manifested by the instrument or statute under which the question arises.

Under a statute requiring the copy of the writ and of the return of the attachment to be deposited in the town clerk's office "at any time within three days thereafter," the day of the attachment is to be excluded.*

CONTRACT. Writ dated September 13, 1871. The officer's return was as follows :

"Hampden, ss. October 3, 1871. By virtue of this writ I this day attached five lots of tobacco as the property of the within named defendant, said tobacco situate one lot in barn of estate of Walter Cooley, one lot in barn of Aaron Day, one lot in barn of Edwin Parsons, one lot in barn of Henry Sibley, and the other lot in barn of Mrs. Day and William White, and afterward on the same day I summoned the within named trustee to appear and answer at court as within directed, by leaving at his last and usual place of abode a true and attested copy of this writ. And the said tobacco could not be moved without damage thereto, and in consideration of its great bulk, I on the sixth day of October deposited in the office of the clerk of the said town of West Springfield an attested copy of this writ, with so much of my return thereon as relates to said attachment of said tobacco, and afterward on the same day summoned the within named defendant to appear and answer at court as within directed, by leaving at his last and usual place of abode a true and attested copy of this writ."

The case was submitted to the Superior Court, and, after a special judgment for the plaintiff for the property attached, to this court, on appeal, upon the following statement of facts :

The property mentioned in the officer's return was duly attached and the attachment perfected, provided the facts set forth in the return constitute a valid attachment. More than four months after the making of the attachment, the defendant filed his petition in bankruptcy, upon which he was duly adjudged bankrupt, and he has since received his discharge.

If the officer's return set forth a valid attachment of the property therein described, judgment was to be rendered for the plaintiff; otherwise, such judgment as the court might order.

* See *Warren v. Slade*, 9 Am. Rep. 70 ; *Westbrook Mfg. Co. v. Grant*, 11 id. 181.

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G Wells, for plaintiff.

M. P. Knowlton, for defendant. The copy of the writ was not seasonably deposited in the clerk's office, under the Gen. Stats., ch. 123, § 57. By section 54 of the same chapter the officer had, before the Stat. of 1860, ch. 70, more than three full days to deposit his copy where real estate was attached "within three days after the day on which the attachment is made." *Hannum v. Tourtellott*, 10 Allen, 494. He would naturally need more time to travel a long distance to the county seat than to go to the office of the clerk in the town where the attachment is made.

An attachment is instantaneous, and the remainder of the day after it is made counts as one; that is a day in which the officer may, if he chooses, deposit his copy. When time is to be computed from the day upon which an event occurs, the day is excluded; when from an act done, it is included. *Perry v. Provident Insurance Co.*, 99 Mass. 162; *Atkins v. Sleeper*, 7 Allen, 487; *Seekonk v. Rehoboth*, 8 Cush. 371; *Fuller v. Russell*, 6 Gray, 128; *Castle v. Burditt*, 3 T. R. 623; *Glassington v. Rawlins*, 3 East, 407.

All the cases in which the day is excluded are founded upon some statute or contract in which there is language "from the time" or the like, equivalent to "from the day" or "from the date," and the general rule stated above is reaffirmed in the late cases. "This rule is applied to statutes directing the service of process in this Commonwealth." *Butler v. Fessenden*, 12 Cush. 78; *Wheeler v. Bent*, 4 Pick. 167.

GRAY, C. J. The rule of construction, stated in some of the old authorities, that when time is to be computed from an act done, the day of the act is to be included, has been rejected in the later English cases, of which it is sufficient to refer to *Lester v. Garland*, 15 Ves. 248, and *Webb v. Fairmaner*, 3 M. & W. 473, where the earlier cases are critically reviewed by Sir WILLIAM GRANT and by Baron PARKE. And the English decisions, cited by the learned counsel for the defendant, cannot govern the case before us.

One of them is *Castle v. Burditt* (1790), 3 T. R. 623, in which the decision was that under a statute providing that certain actions should not be brought until one month after written notice thereof to the defendant, the day of the delivery of the notice must be included. Although the court said that the case came within the rule above mentioned, it is evident that it was not intended to affirm that rule to be universal; for in *Ex parte Fallon* (1793), 5 T. R. 283, the same judges held that under Stat. 17 Geo. III, ch. 26, requiring a deed to be enrolled within twenty days

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from its execution, the day of the execution was to be excluded. The reason assigned by Lord KENYON in *Ex parte Fallon* was one which has been often repeated since: "Suppose the direction of the act had been to enroll the memorial within one day after the granting of the annuity, could it be pretended that that meant the same as if it were said that it should be done on the same day on which the act was done? If not, neither can it be construed inclusively, when a greater number of days is allowed." And Mr. Justice BULLER considered the case to be governed by the authority of the decision in 2 Inst. 674; S. C., Dyer, 218, *b*; Mo. 40; that under the Stat. of 27 Hen. VIII, ch. 16, requiring deeds to be enrolled "within six months next after the date of the same," it was just as if the statute had said "after the day of the date," and the day was excluded. It should be added that the case of *Castle v. Burditt* has been directly overruled in England. *Young v. Higgon*, 6 M. & W. 49, and cases cited.

In 1796, the House of Lords, upon an appeal from Scotland, held that under a statute providing that deeds made in the last illness of the grantor should be void, unless he lived "for the space of three score days after making and granting thereof," the day of the execution of the deed must be excluded, and that a deed made on February 22, by a man who died at a later hour on April 22, 1791, was invalid; and Lord THURLOW (Lord LOUGHBOROUGH concurring) said: "The *terminus a quo* mentioned in the act is descriptive of a period of time, and synonymous with the date or day of the deed, which is indivisible, and *sixty days after* is descriptive of another and subsequent period, which begins when the first period is completed. The day of making the deed must therefore be excluded; so the maker lived only fifty-nine days of the period required. Had he seen the morning of the sixtieth or subsequent day, it would have been sufficient; the rule of law above mentioned (*Dies incipit pro completo habetur*) then applying, and making it unnecessary and improper to reckon by hours, or to inquire if the last day was completed." *Mercer v. Ogilvy*, 3 Paton, 434, 442.

The only other English case cited for the defendant is *Glassington v. Rawlins*, 3 East, 407, deciding that under Stat. 21 Jac. I, ch. 19, which provided that any trader, who should "after his arrest lie in prison two months," should be adjudged a bankrupt, the day of arrest must be included in computing the two months. But in that case, as observed by Baron PARKE in *Webb v. Fairmaner*, 3 M. & W. 473, 476, the party clearly lay in prison on that day. Each day being in contemplation of law indivisible, the decision computing the day of his commitment as one of the days of his imprisonment corresponded to the familiar rule by

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which the day of a person's birth is included, and he is held by law to become of age on the day before the twenty-first anniversary thereof. Metc. on Cont. 38; *Bardwell v. Purrington*, 107 Mass. 419.

The statement of Mr. Justice STORY in *Arnold v. United States*, 9 Cranch, 104, 120, that "it is a general rule, that where the computation is to be made from an act done, the day on which the act is done is to be included," had no application to the case before the court, in which the point decided was that a statute which was to take effect "from and after the passing thereof" took effect immediately, without waiting for the expiration of the day on which it was passed; and to apply the rule quoted would include the whole of that day, and so give the statute a retroactive effect which could not be allowed. *The Brig Ann*, 1 Gallison, 62, 66; *Kennedy v. Palmer*, 6 Gray, 316; 1 Kent's Com. (12th ed.) 454, 455.

In the recent case of *Sheets v. Selden*, 2 Wall. 177, 189, on the other hand, where a lease provided that the rent should be paid semi-annually on certain days, and that, if any installment should remain unpaid for one month from the time it should become due, the lessor might enter and take possession, it was held that the day on which the rent fell due must be excluded; and it was said that the general current on modern authorities, on the interpretation both of contracts and of statutes, when time is to be computed from a particular day or a particular event, is to exclude the day designated; citing *Cornell v. Moulton*, 3 Denio, 12, and *Bigelow v. Willson*, 1 Pick. 485.

In this Commonwealth, the general rule, as applied in a variety of circumstances, and now well established, is, that in computing time from the date, or from the day of the date, or from a certain act or event, the day of the date is to be excluded, unless a different intention is manifested by the instrument or statute under which the question arises. But as conflicting opinions have been expressed in some of the cases, it is proper to consider them in detail.

The leading case is *Bigelow v. Willson*, 1 Pick. 485, in which it was held that under the Stat. of 1815, ch. 137, authorizing the owner of an equity of redemption, sold on execution and conveyed by the officer, to redeem it "within one year next after the time of executing" the deed, the day on which the deed was executed was excluded; and Mr. Justice WILDE, who delivered the judgment of the court, assigned, as reasons for the decision, that a day in a legal sense is an indivisible point of time, there being no fractions of a day; that "the time of executing" the deed was the day of delivery, and equivalent to "the date" or "the day of the date;" that before the case of *Pugh v. Leeds*, Cowp. 714, all the

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cases agreed that "from the day of the date" were words of exclusion, and such was still their usual signification, unless, as was there held in the case of a lease, the clear intention of the parties was to include that day; that no moment of time can be said to be after a given day until that day has expired; that if a day is considered as an indivisible point of time, there can be no distinction between a computation from an act done, and a computation from the day on which the act was done; and that the rule including the day, in the first alternative, was founded upon an exploded distinction, originally introduced for the purpose of saving leases from the objection that they commenced *in futuro*, and of doubtful authority.

So in *Seekonk v. Rehoboth*, 8 Cush. 371, 373, Chief Justice SHAW said: "We consider it now well settled as a general rule, that when an act is to be done within a given number of days from the date, or day of the date, or act done, the day of the date is excluded; otherwise an act to be done in one day must be done on the same day; and as there is no fraction of a day, such stipulation must create an obligation to do it *instantly*;" and it was accordingly held that under the Rev. Stats., ch. 46, § 15, by which a town liable for the support of a pauper was required, in order to exempt itself from liability beyond a certain rate, to remove him "within thirty days from the time of receiving legal notice that such support has been furnished," the day on which the notice was received should not be included in the thirty days.

Again, in *Fuller v. Russell*, 6 Gray, 128, it was held that possession taken by a mortgagee for breach of condition, which, "being continued peaceably for three years," was declared by the Rev. Stats., ch. 107, § 1, to foreclose the right of redemption, must continue for three years, beginning with the day following that on which possession was taken. And in a very recent case it was decided that, under the Gen. Stats., ch. 124, § 14, which prohibit the giving of a second notice of a desire to take the poor debtor's oath, "until the expiration of seven days from the service of the former notice must be excluded, and that when that day was the 24th of the month, a new notice on the 31st was bad. *Millett v. Lemon*, 113 Mass. 355.

The general rule, thus deliberately affirmed and repeatedly acted on, cannot be deemed to be shaken by the mention, in *Butler v. Fessenden*, 12 Cush. 78, 79, of the opposite rule as stated in, and evidently borrowed from, *Castle v. Burditt* and *Glassington v. Rawlins*, *ubi supra*. The point adjudged in *Butler v. Fessenden* was that, by the settled practice in computing the time of service before the return day of process, the day of service is included. The same practice prevails in other States and

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in England. *Hoffman v. Duel*, 5 Johns. 232; *Columbia Turnpike v. Haywood*, 10 Wend. 422; *Day v. Hall*, 7 Halst. 203; *Thomas v. Afflick*, 16 Penn. St. 14; *Barto v. Abbe*, 16 Ohio, 408; *The King v. Justices of Cumberland*, 4 Nev. & Man. 378; S. C., 2 A. & E. 463. If the day of service, as well as the return day, were excluded, the defendant would be allowed parts of both those days beyond the time required by law. By a like practice in this Commonwealth, the first publication of an order of notice required to be published for a certain number of weeks may be made at any time in the week. *Frothingham v. March*, 1 Mass. 247; *Dexter v. Shepard*, 117 id. 480.

The ruling in *Wheeler v. Bent*, 4 Pick. 167, that under the Stat. of 1817, ch. 190, § 7, requiring appeals from the judge of probate to be proceeded with at the term of this court "holden next after the expiration of thirty-four days after such appeal shall be made," the day on which the appeal was made should be reckoned as one of the thirty-four, appears by the report to have been made summarily and without argument; and it might be difficult to reconcile it with the words of the statute or the decisions of other courts. *Ex parte Dean*, 2 Cowen, 605; *Commercial Bank v. Ives*, 2 Hill (N. Y.), 355; *Vandenburg v. Van Rensselaer*, 6 Paige, 147; *Sims v. Hampton*, 1 S. & R. 411; *Weeks v. Hull*, 19 Conn. 376; *Ewing v. Bailey*, 4 Scam. 420; *Williams v. Burgess*, 12 A. & E. 635; S. C., 4 P. & D. 443. But the mode prescribed by that statute, of computing the time of performance of the several acts connected with the appeal, was, as justly observed by the commissioners on the Revised Statutes, "complicated and somewhat confused," and has been altered, Rev. Stats., ch. 83, §§ 34-37, and commissioners' notes. Gen. Stats., ch. 117, §§ 9, 10. We cannot therefore safely take that ruling as a guide, and need not consider its correctness.

It was indeed decided in *Presbrey v. Williams* 15 Mass. 193, and assumed, though not necessary to the decision, in *Little v. Blunt*, 9 Pick. 488, 491, that in computing the period of limitation of actions, the day on which the cause of action accrued should be included, because the action might have been brought on that day. But the decision was rested on the authority of *Norris v. Gawtry*, Hob. 139; S. C., Mo. 878; 1 Brownl. 156; and can hardly stand with the later adjudications. *Paul v. Stone*, 112 Mass. 27; *Cornell v. Moulton*, 3 Denio, 12; *Owen v. Slatter*, 26 Ala. 547; *Warren v. Slade*, 23 Mich. 1; S. C., 9 Am. Rep. 70; *Pellew v. Wonford*, 9 B. & C. 134; S. C., 4 Man. & Ry. 130; *Hardy v. Ryle*, 9 B. & C. 603; S. C., 4 Man. & Ry. 295; Angell on Lim., ch. 6.

The dictum in *Atkins v. Sleeper*, 7 Allen, 487, 488, repeated in *Perry v. Provident Ins. Co.*, 99 Mass. 162, 163, that "where time is computed from

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an act done, the general rule is to include the day," was aside from the decision of the court in each case ; for, in the first, the computation was to be made from a certain day, and was held to exclude that day ; and in the second, whether the day was included or excluded made no difference in the result ; and it is supported by none of the authorities cited, except upon grounds which are expressly repudiated in *Bigelow v Willson, ubi supra*.

From this review of the cases, it follows that the provision of the Gen. Stats., ch. 113, § 57, requiring the copy of the writ and return of the attachment of bulky personal property to be deposited in the town clerk's office "at any time within three days thereafter," is not distinguishable, so far as regards the computation of time, from the provision of section 54 of the same chapter which requires like copies, in case of an attachment of real estate, to be deposited in the office of the clerk of the courts "within three days after the day on which the attachment is made ;" and that in either case the day of the attachment is to be excluded in computing the three days within which the copies may be deposited in the clerk's office. *Hannum v. Tourtellott*, 10 Allen, 494. And by the terms of the case stated, there must be

Judgment for the plaintiff.

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(118 Mass. 554.)

Mortgage — power of sale — purchase by mortgagee — bankruptcy of mortgagor.

A mortgagee selling under a power of sale in the mortgage may, if its terms authorize him so to do, be the purchaser at the sale, and make the deed in his own name directly to himself.

A mortgagee sold the mortgaged premises under a power of sale in the mortgage, which empowered him, upon breach of condition, to sell the premises and convey the same, in his own name or as the attorney of the mortgagor, by proper deeds to the purchaser absolutely and in fee simple, and provided that the mortgagee, or any person in his behalf, might purchase at the sale. The deed was made by the mortgagee, both in his own name and as attorney of the mortgagor, directly to himself. *Held*, that the power was properly executed, that the deed conveyed a valid title to the mortgagee, and that the fact of the mortgagor's bankruptcy prior to the sale did not affect the authority of the mortgagee to execute the deed in his name and as his attorney.

BILL in equity, filed October 28, 1874, to redeem a parcel of land in Blackstone from a mortgage.

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At the hearing before COLT, J., the following facts were admitted :

The plaintiff is the wife of Edward S. Hall, of the city of New York, who, on January 24, 1870, being the owner of a manufacturing establishment in Blackstone, consisting of real and personal estate, mortgaged the same to Alexander T. Stewart, of New York, to secure the payment of \$80,000 on demand with interest, the plaintiff joining in the mortgage, in release of her own right of dower. The mortgage contained the following clauses :

“ Provided, nevertheless, that if the said grantor, or his heirs, executors, administrators or assigns, shall pay unto the said grantee, or his executors, administrators or assigns, the sum of eighty thousand dollars on demand, with interest semi-annually, at the rate of seven per cent per annum, and until such payment shall pay all taxes and assessments on the granted premises, shall keep all buildings thereon insured against fire in a sum not less than eighty thousand dollars, for the benefit of the said grantee and his executors, administrators and assigns, at such insurance office as they shall approve, and shall not commit, or suffer any strip or waste of the granted premises, then this deed, as also a note of even date herewith, signed by the said Edward S. Hall, whereby he promises to pay to the said grantee or order the said sum and interest, at the times aforesaid, shall be void. But upon any default in the performance of the foregoing condition, the said grantee or his executors, administrators or assigns, may sell the granted premises, with all improvements that may be thereon, and all the fixtures and machinery therein contained, by public auction in said town of Blackstone, first publishing a notice of the time and place of sale, once each week for three successive weeks, in one or more newspapers published in said county of Worcester, and in their own name, or as the attorney of the said grantor, may convey the same by proper deed or deeds to the purchaser or purchasers, absolutely and in fee simple ; and such sale shall forever bar the grantor, and all persons claiming under him, from all right and interest in the granted premises, whether at law or in equity ; and out of the money arising from such sale, the said grantee or his representative shall be entitled to retain all sums then secured by this deed, whether then or thereafter payable, including all costs, charges and expenses incurred or sustained by reason of any failure or default on the part of the said grantor or his representatives to perform and fulfill the condition of this deed or any covenant or agreement herein contained ; rendering the surplus, if any, together with an account of all such costs, charges and expenses to the said grantor or his heirs or assigns. And it is agreed that in case any sale

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shall be made as aforesaid, the grantor, or his heirs or assigns, will, upon request, execute and deliver such further deeds or instruments as may be necessary or proper to confirm such sale and to vest a perfect title to the premises sold in the purchaser thereof; that the said grantee, or his executors, administrators or assigns, or any person or persons in their behalf, may purchase at said sale, and that no other purchaser shall be answerable for the application of the purchase-money."

On October 31, 1871, the mortgage debt being unpaid, Stewart entered upon the real estate to foreclose the mortgage, and recorded a certificate of his entry. On December 1, 1871, Hall being then the owner of the mortgaged property, subject to the mortgage, was adjudged a bankrupt, upon his own petition, by the District Court of the United States for the Southern District of New York, and on January 19, 1872, John H. Platt was appointed his assignee and received an assignment of his estate in due form. The mortgage debt remaining unpaid, Stewart advertised the mortgaged property for sale by public auction, under the power on December 13, 1871, and, at the auction sale held on that day, bid off the whole property, in his own name, for \$50,000, and executed, under seal, in his own name, and as the attorney of Hall, a deed, which, after reciting the making of the mortgage to him, the power of sale, the default, the publication of the notice and sale, proceeded as follows: "Now, therefore, know all men, that we the said Edward S. Hall, by Alexander T. Stewart, his attorney, duly authorized as aforesaid, and Alexander T. Stewart, by virtue and in execution of the power contained in said mortgage deed as aforesaid, and of every other power and authority me hereto enabling, do, in consideration of fifty thousand dollars to me paid by the said Alexander T. Stewart, of said New York, hereby give, grant, bargain, sell and convey unto the said Alexander T. Stewart, all and singular, the premises conveyed by the aforesaid mortgage deed," "to have and to hold the same to the said Alexander T. Stewart and his heirs and assigns, to their use and behoof forever. In witness whereof we, the said Edward S. Hall and Alexander T. Stewart, have hereunto set our hands and seals this twenty-third day of December, 1871. EDWARD S. HALL, [Seal.]

" by ALEXANDER T. STEWART, *Atty.*

" ALEXANDER T. STEWART, [Seal.]"

This instrument was acknowledged the same day, and, with Stewart's affidavit of his doings, was recorded on December 27, 1871.

On March 5, 1872, Stewart conveyed all said mortgaged property, by quit-claim deed, to Platt as assignee, who, on the same day, conveyed the same to the defendants.

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The property insured was partly destroyed by fire, February, 1873, and the defendants received a considerable amount of insurance money therefor.

The case was reserved, upon the foregoing facts, for the consideration and determination of the full court. If the court should be of the opinion that the plaintiff's right to redeem was barred, then the plaintiff's bill was to be dismissed; otherwise the case to be sent to a master to take the accounts necessary for the further determination of the case.

T. L. Nelson & A. G. Bullock, for plaintiff. As the plaintiff's bill was filed within three years after the entry to foreclose, her right to redeem the mortgage is clear, unless it is barred by the other proceedings. *Davis v. Wetherell*, 13 Allen, 60.

The power of sale was never properly executed. Stewart was authorized, in case of default in the performance of the condition of the mortgage, to sell the mortgaged premises at public auction, and to convey the same to the purchaser at such sale, either by his own deed, or by the deed of Hall, executed by Stewart as his attorney. No other method of executing the power was provided, and unless the power has been so executed, the mortgage has never been foreclosed and the plaintiff's right of redemption is still outstanding. The instrument relied upon as effecting a sale of the premises to Stewart is not a good execution of the power. It is not the deed or conveyance of Hall or of his grantee, or of Stewart.

It was impossible for Stewart to make a deed to himself, either in his own name or as the attorney of Hall. *Dexter v. Shepard*, 117 Mass. 480; *Jackson v. Colden*, 4 Cow. 266; *Varnum v. Meserve*, 8 Allen, 158; *Montague v. Dawes*, 12 id. 397; S. C., 14 id. 369; 4 Cruise's Dig. (Greenl. ed.), tit. 32, ch. 1, § 25, *note*; Gen. Stats., ch. 89, § 2.

The power of sale is to be strictly construed, and no title passes under it, unless all the conditions thereof are strictly complied with. *Smith v. Provin*, 4 Allen, 516; *Montague v. Dawes*, 14 id. 369; *Roche v. Farnsworth*, 106 Mass. 509; *Powell v. Monson & Brimfield Manufacturing Co.*, 3 Mason, 347; 2 Perry on Trusts (2d ed.), § 602.

The transaction cannot be supported by the clause in the mortgage which authorized the mortgagee, or any person or persons in his behalf, to purchase at the sale. If it was intended by that clause to constitute such an instrument a deed or conveyance, the clause was simply void. But it may well be construed as authorizing the mortgagee to bid in the estate at the sale, and to take a conveyance through a third person. *Dexter v. Shepard*, 117 Mass. 480.

As an execution of the power of attorney from Hall this execution is

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inoperative, because Hall had been adjudged a bankrupt, and the power of attorney revoked. *Varnum v. Meserve*, 8 Allen, 158; Story on Agency (7th ed.), § 482.

G. F. Hoar, for defendants.

GRAY, C. J. Although equity will not allow the holder of a mortgage containing a power of sale to become a purchaser at a sale under the power, unless expressly so authorized by the terms of the mortgage (*Downes v. Grazebrook*, 3 Meriv. 200; *Dyer v. Shurtleff*, 112 Mass. 165), there is no doubt that, under a mortgage containing such provisions as that now before us, a purchase made by the mortgagee and for his sole benefit is valid and effectual to cut off all right of redemption, provided the mortgagee faithfully discharges in all respects the duties imposed upon him as donee of the power; and that in the case at bar, if the land had been conveyed by him to one purchasing in his behalf, and immediately reconveyed to him by the latter, the power would have been well executed. *Dexter v. Shepard*, 117 Mass. 480; *Wilson v. Troup*, 7 Johns. Ch. 25, and 2 Cow. 195.

The plaintiff contends that the deed executed in this case was void, because it was made by the mortgagee directly to himself. But this position is founded upon a misapprehension of the legal nature and effect of a mortgage with power of sale, and of a deed made in execution of the power.

Such a mortgage vests a seisin and a conditional estate in the mortgagee, with the power superadded to convey an absolute estate by a sale pursuant to the terms of the power. The execution of the power does but change, in accordance with the terms of the mortgage deed, the uses upon which the estate is to be held. The purchaser at the sale takes, not as the grantee of the mortgagee, but as the person designated or appointed by the mortgagee in execution of the power, and derives his title from the mortgagor, as if the designation or appointment had been inserted in the original deed, and the seisin or interest to serve the estate is raised by that deed. Butler's note to Co. Litt. 271, *a.*; 1 Sugd. on Pow. (7th ed.) 242; 2 *id.* 22, 23; 4 Kent's Com. (12th ed.) 327, 337.

The books afford many illustrations of this principle. The donee may convey a fee, if authorized by the terms of his power, although by the instrument creating it he has himself only an estate for life. Butler's note to Co. Litt., *ubi supra*; *Sedwick v. Laflin*, 10 Allen, 430. So a deed or will of a married woman may be a valid execution of a power, when it could not take effect as a deed or will. *Granston v. Crane*, 97 Mass. 459;

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Logan v. Bell, 1 C. B. 872. Although a husband cannot at common law convey to his wife, yet he may make an immediate appointment to her. *Butler's case*, cited Benl. 180, and Latch, 139; *Sergison v. Sealy*, 9 Mod. 390; S. C., 2 Atk. 413, *note*; 2 Sugd. on Pow. 24. And if the terms of the power allow it, the donee of a power may appoint to the use of himself in fee, and execute the power by a deed directly to himself. *Townshend v. Windham*, 2 Ves. Sen. 1, 9; *Barford v. Street*, 16 Ves. 135; *Mackintosh v. Barber*, 1 Bing. 50; S. C., 7 Moore, 315; 1 Sugd. on Pow. 142, 143. Sugd. on Vend. (14th ed.) 69; Williams on Real Property (4th ed.), 245.

The decision in *Field v. Gooding*, 206 Mass. 310, that, upon a sale under a power in a mortgage, the wife of the mortgagor might be the purchaser and have the estate conveyed to her, is in no wise inconsistent with this view. The fact that the husband had previously sold the equity or redemption relieved that case from the difficulties which might have existed if he had owned it at the time of the sale. See *Tucker v. Fenno*, 110 Mass. 311. The intervention of the mortgagee as donee of the power removed the technical objection that the husband could not convey directly to his wife. A husband may covenant with a third person to stand seized to the use of his wife. *Thatcher v. Omans*, 3 Pick. 521; *Johnson v. Johnson*, 7 Allen, 196. And even a deed of bargain and sale may operate as a covenant-to stand seised, when it is necessary that it should have that effect in order to carry out the manifest intention of the parties. *Pray v. Pierce*, 7 Mass. 381, 384; *Russell v. Coffin*, 8 Pick. 143, 151; *Trafton v. Hawes*, 102 Mass. 533, 541.

The suggestions in *Dexter v. Shepard*, 117 Mass. 480, and in *Jackson v. Colden*, 4 Cowen, 266, that upon a sale under the power in a mortgage, the deed could not be made by the mortgagee to himself, were by way of argument only, and not of adjudication; for in *Dexter v. Shepard* the purchase and conveyance were made through a third person; and in *Jackson v. Colden* the court held that under a statute containing provisions similar to those of this mortgage, no deed was necessary when the mortgagee became the purchaser at the sale, and, although the counsel on both sides and the other judges assumed that it would be impossible to make such a deed, Chief Justice SAVAGE implied that, if any deed was necessary, a deed from the mortgagee to himself would be valid.

In the case at bar, the mortgage provides in the most distinct terms that either the mortgagee or any person in his behalf may purchase at the sale, and that the deed to the purchaser may be made by the mortgagee, either as the attorney of the mortgagor or in his own name. The deed might therefore be executed in either form. *Cranston v. Crane*,

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97 Mass. 459, 464. And the deed before us is actually executed in both.

The power, being coupled with an interest in the estate conveyed, could not be revoked by the mortgagor; and the authority of the mortgagee to execute it in the mortgagor's name and as his attorney was not affected by his bankruptcy; for his assignee could only take subject to the rights of the mortgagee. *Dixon v. Ewart*, 8 Meriv. 822; Story on Agency, § 482; Gen. Stats., ch. 140, § 89. And the authority to execute the power in the name of the mortgagee would continue notwithstanding the bankruptcy, or even the death, of the mortgagor. *Corder v. Morgan*, 18 Ves. 344; *Varnum v. Meserve*, 8 Allen, 158; *Conners v. Holland*, 113 Mass. 50; *Bergen v. Bennett*, 1 Caines' Cas. 1.

It follows that the power has been duly executed, and the mortgagee has become the absolute owner of the estate, and that the plaintiff, having joined in the mortgage by way of releasing her dower, is not entitled to redeem.

Bill dismissed.

CASES
IN THE
SUPREME COURT OF ERRORS.
OF
CONNECTICUT.

JACQUES v. THE BRIDGEPORT HORSE RAILROAD COMPANY.

(41 Conn. 61.)

Damages — in actions for negligence — special damages — professional reputation of plaintiff.

In an action to recover damages for an injury caused by defendant's negligence, plaintiff claimed damages for being disabled to practice his profession as a physician. *Held*, that defendant might introduce evidence as to his professional reputation, and as to the unlawfulness of his practice.

ACTION of trespass on the case to recover damages caused by defendants' negligence. The court found as facts that while plaintiff was driving over defendants' track, his carriage was broken and himself injured by reason of the improper condition of defendants' track. As one of the grounds of damages the plaintiff claimed that on account of his injuries he was unable to attend to his business, which was that of a practicing physician and surgeon, for sixty days in 1871 immediately following his injury, for twenty-five days in the early part of 1872, and for the whole time from December 1st, 1872, to October 13th, 1873, which the court found to be true. The receipts of the plaintiff from his professional practice were about \$5,000 a year.

The defendant offered evidence tending to show that plaintiff's practice as a physician was unlawful.

The court found that the plaintiff had suffered damage to the amount of \$7,500. Defendant moved for a new trial.

G. H. Watrous and *G. Stoddard*, in support of motion, cited, as to evidence of the unlawful character of the plaintiff's practice being admissible, *Shearm. & Redf. on Negligence*, § 599, *a*; *Kane v. Johnston*, 9

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Bosw. 154; *Sherman v. Fall River Iron Works Co.*, 2 Allen, 524, and 5 id. 213; *Abbott v. Wyse*, 15 Conn. 254, 260; *Isbell v. N. York & N. Haven R. R. Co.*, 25 id. 562; as to evidence of reputation in this respect being admissible, *Wheeler v. Packer*, 4 Conn. 106; *State v. Watkins*, 9 id. 53; *Belden v. Lamb*, 17 id. 450; *Ogden v. Raymond*, 22 id. 383; *Calkins v. City of Hartford*, 33 id. 60; Hilliard on Remedies for Torts, book 4, ch 2, § 55.

Sanford, with whom was *Shelton*, *contra*, cited, as to the inadmissibility of the evidence with regard to the illegal character of the plaintiff's practice, and with regard to his professional reputation, *Goddard v. Pratt*, 16 Pick. 433; *Sheldon v. Root*, id. 570; *Humphrey v. Humphrey*, 7 Conn. 117; *Pratt v. Randolph*, 24 id. 363; *Wright v. McKee*, 37 Vt. 161; *Swift's Ev.* 140.

FOSTER, J. [after deciding an unimportant point.] The plaintiff claimed to recover damages not only for bodily injuries, and injuries affecting his health, but also for losses sustained in his profession, which was that of a physician and surgeon, by being thrown out of practice.

The defendants claimed that the professional practice of the plaintiff was illegitimate and unlawful, and, for the purpose of proving that claim, proposed certain questions to the plaintiff, which were objected to and excluded by the court. The defendants also introduced a witness of whom they asked, what was the reputation of Dr. Jacques as a physician in 1871, and thereafter, up to the time when he stopped business, as to the lawfulness of his practice. To this question the plaintiff objected, and the court excluded it.

As the plaintiff sought to recover damages on account of being disabled from practicing his profession, his reputation, as to the lawfulness or unlawfulness of his practice, became a proper subject of inquiry. The value of that practice must have depended very largely upon that reputation. If his practice was unlawful, no matter how lucrative it might have been, the loss of it would lay no foundation for the recovery of damages. The questions put to the plaintiff, and also to the other witness, may not have been the best mode which could have been adopted for reaching the truth; still we think the questions should not have been excluded. The plaintiff's claim, in effect, put his professional reputation in issue and made these questions proper. The answers to them would tend to throw light upon the subject which the defendants had a right, under the circumstances, to investigate.

[The remainder of the opinion is not important.]

Notice for new trial granted.

Gregory v. City of Bridgeport.

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(41 Conn. 76.)

Municipal corporation — when may indemnify its officers.

A municipal corporation may legally indemnify an officer, acting in good faith, for a loss incurred in the discharge of his official duty; but the duty must have been one authorized or imposed by law, and the matter one in which the corporation had an interest.

An officer was appointed by a city to execute a by-law relating to wharves and the mooring of vessels. His duty was simply to regulate differences among owners and masters of vessels and owners of wharves, and his compensation was paid by the persons at whose request he acted. *Held*, that the city could not appropriate money to indemnify him for expenses incurred in defending an action brought against him for an act done in the discharge of his duty.

PETITION by a resident and tax payer of Bridgeport to restrain the payment by defendants of a sum of money appropriated and ordered paid by the common council of defendants to one Brooks to indemnify him for expenses incurred by him in defending an action brought against him for acts done by him in the discharge of his duty as superintendent of wharves of said city. The respondent set up in answer the authority conferred upon him by the charter and by-laws of the city and his appointment as superintendent of wharves; that as such superintendent it became his duty to order that a certain vessel lying at the wharf of the petitioner in said city should be hauled astern far enough to permit a certain other vessel to obtain a berth at the dock, and that the action against him referred to in the petition was brought to recover damages claimed for that act; that said order was made by respondent in the discharge of his duty in good faith and without malice. The court found the facts substantially as stated.

The ninth section of the city charter provides as follows: "Said common council shall have power, by a major vote of those present, to make and ordain by-laws or ordinances relating to wharves, and the anchoring, moving and mooring of vessels within said city."

The 32d section of the charter is as follows: "The common council of said city shall have power and authority to constitute and appoint all necessary and proper officers, under such names and appellations as they may deem appropriate, and may invest them with the power and authority necessary and proper, not inconsistent with the laws of this State and of the United States, to carry into effect all the by-laws, ordinances and lawful orders of the common council."

The following by-law was passed by the common council and approved by the freemen of the city in a city meeting:

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" SEC. 1. That the common council of said city shall, from time to time, appoint one or more persons superintendents of wharves and docks, who shall hold their office during the pleasure of the common council, each of which superintendents shall have power to act only within the limits of the district assigned to him by the common council.

" SEC. 2. The superintendent of each district shall have full power to order and regulate, whenever thereto requested by the owner or lessee of any wharf within his district in said city, the laying or mooring of any and all vessels at such wharf, and when and how any and all vessels shall haul off from such wharf, to allow other vessels to pass or wind, or to receive or discharge their cargoes. The superintendent of each district shall also have full power, whenever in his judgment injury may be occasioned to any wharf within his district by reason of any impending storm, to order and cause any vessel lying at such wharf to haul off and anchor at such reasonable distance therefrom as he may direct.

" SEC. 3. The superintendent of each district shall have full power, whenever called upon by the owner or lessee of any wharf within his district in said city, or by the owner or master of any vessel wishing to discharge her cargo at any such wharf, to settle and determine in what manner and at what part of such wharf the whole or any part of the cargo shall be discharged.

" SEC. 4. Said superintendent shall be entitled to receive from the person or persons at whose request he may act, the sum of thirty cents per hour for the time he shall be actually employed.

" SEC. 5. The masters and owners of every such vessel who shall fail or refuse to comply with any of the orders, directions and regulations that may be made by the superintendent of each district as provided by this law, shall severally forfeit and pay for the use of said city for each and every such failure or refusal, a fine not less than twenty-five nor more than thirty dollars."

Upon these facts the case was reserved by the Superior Court for the advice of this court.

Treat and Blake, for petitioner.

M. W. Seymour and De Forest, for respondents. 1. It is one of the powers inherent in every municipal corporation to indemnify its officers and agents against liability which they may incur in the *bona fide* discharge of their duties, even though the result may show that they exceed their authority. *Dillon on Mun. Corp.*, § 98; *Baker v. Windham*, 13

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Me. 74; *Pike v. Middleton*, 12 N. H. 278; *Briggs v. Whipple*, 6 Vt. 95; *Nelson v. Milford*, 7 Pick. 18; *Bancroft v. Lynnfield*, 18 id. 566; *Babbitt v. Savoy*, 3 Cush. 530; *Hadsell v. Hancock*, 3 Gray, 526; *Fuller v. Groton*, 11 id. 340; *Sherman v. Carr*, 8 R. I. 431. This rule of law is decisive of the present case.

2. Capt. Brooks was an officer or agent of the city of Bridgeport within the meaning of the rule. He was regularly elected by the common council in strict compliance with the provisions of the charter. Even if his election had been informal and technically defective, so that he could not strictly be called an officer of the city, yet he was an agent of the city, performing, at the request of the common council, duties which it was competent for them to intrust to him. So long as the very acts performed by him were not beyond the authority conferred by law upon the common council, the council having directed the acts to be done by him, or even having ratified and approved them, have made him their agent in the transactions, and have power to indemnify him.

3. He was, as a municipal officer, acting for the interest of the city in a matter in which the city had a private and peculiar concern, and was not performing any public or governmental functions. *Jewett v. City of New Haven*, 38 Conn. 368; *Jones v. City of New Haven*, 34 id. 1. But even if he be regarded as a public or governmental officer, still the city has power to indemnify. *Bancroft v. Lynnfield*, 18 Pick. 566; *Fuller v. Groton*, 11 Gray, 340; *Babbitt v. Savoy*, 3 Cush. 530.

4. He did not exceed his authority. See charter and ordinance. But if it be admitted that he did exceed his authority, yet he certainly acted in good faith, as appears from the finding, and this is enough. In all the cited cases, except three, the officers exceeded their authority.

PHELPS, J. The record in this cause presents for decision the question whether the respondent is legally authorized to make an appropriation from its treasury to indemnify an officer appointed under a by-law enacted by its common council, and approved by itself, in pursuance of authority conferred by its charter.

The officer or agent of a municipal corporation may be legally indemnified, provided he has acted in good faith in the discharge of his official duty in a matter in which the corporation had an interest and with respect to a duty imposed or authorized by law. The general powers of such corporations are clearly prescribed, and those which are incidental, and implied in aid of those expressed, are generally not difficult of designation. The authority to appropriate money for objects within the scope of the powers either conferred or implied, is indispensable to the proper

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and efficient exercise of municipal functions, but it is an authority especially unsafe and liable to abuse, unless regulated by the application of sound legal principles, the interpretation of which is neither doubtful or discretionary.

The charter of the respondent gives its common council power to ordain by-laws relating to wharves, and the anchoring, moving and mooring of vessels within its limits, and the care and management of all wharves and landing places, and authority to make and cause to be executed all proper orders in relation to the protection, use and improvement thereof, and to appoint all necessary and proper officers, and invest them with power and authority necessary and proper to carry into effect the by-laws, ordinances, and proper orders of its common council. Under the authority thus conferred the by-law in question, and the appointment under it of Capt. Brooks as superintendent of wharves, were made. We are satisfied he was legally appointed, and that the by-law was regularly passed, and possessed all the validity of a lawful ordinance; and if the fact was decisive of the issue, we should have no difficulty in deciding that he believed himself at the time to be acting in the proper discharge of his official duty, and was not guilty of the bad faith and malicious conduct toward the petitioner which were imputed to him.

These considerations, though important in themselves, and if found in favor of the petitioner controlling, are not so deeply imbedded in the real merits of the case, as the question whether the respondent had such an interest in the subject-matter of the controversy between the petitioner and Brooks as to entitle it to indemnify the latter for the expenses incurred by him in defending in the litigation which attended that controversy. This question lies at the foundation of the case, and is vital as affecting the right of such corporations as the respondent to make pecuniary appropriations for purposes not expressly, or by clear implication, within the grant of power on which all their corporate authority depends. The artificial legal body known as a municipal corporation is a creature of limited powers. It possesses only such as are specifically granted by the law which confers upon it the right to exist, and such others as are necessary for the purpose of carrying into effect those expressly given. These powers are derived from the general statutes, and from special acts of incorporation, and should not be unnecessarily extended by construction. The act sought to be done should be fairly within the scope of the corporate power, and the principle of implication from which authority not expressly given is claimed to be derived, should be always carefully guarded in the interest and for the protection of the citizen, whose property in the form of taxation is largely subject to the demands and under the control of the municipality.

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The by-law referred to is not compulsory in its terms, and does not assume to compel the officer appointed in pursuance of it to exercise official functions on peril of a forfeiture for refusal. His prescribed duty is simply to hear applications and complaints, and issue orders for the adjustment of differences between those who make conflicting claims connected with the prosecution of their private business. If he consents to act it is at the request of the owners and masters of vessels and the owners and lessees of wharf property, and not at the request of the respondent, or of any of its officers or agents. His compensation, though determined by the by-law, is to be paid by the persons at whose request he acts. They may be non-residents and even aliens owing allegiance to a foreign government, and temporarily within the territorial limits of the corporation for purposes of commercial intercourse. He is not the agent or servant of the respondent, nor subject to its control, and it is not responsible for his official negligence, misconduct, or delinquency, nor benefited by his efficiency and fidelity. With respect to his official character and obligations, the respondent has "no duty to perform, no rights to defend, and no interest to protect," and no pecuniary or corporate concern in the subject-matter connected with the discharge of his official duties. The want of interest involves the want of power, and is necessarily fatal to the claims of the respondent. *Merrill v. Plainfield*, 45 N. H. 126; *Gove v. Epping*, 41 id. 530; *Halstead v. Mayor, etc., of New York*, 3 Comst. 430; *Martin v. Mayor, etc., of Brooklyn*, 1 Hill, 545; *Hodges v. City of Buffalo*, 2 Denio, 110; *Vincent v. Nantucket*, 12 Cush. 105; *Stetson v. Kempton*, 13 Mass. 272; *Nelson v. Milford*, 7 Pick. 18; *Fuller v. Groton*, 11 Gray, 350; *Babbitt v. Savoy*, 3 Cush. 530; *Bancroft v. Lynnfield*, 18 Pick. 566; *Tash v. Adams*, 10 Cush. 252; *Craftin v. Hopkinton*, 4 Gray, 502; *Hood v. Mayor, etc., of Lynn*, 1 Allen, 103; *Briggs v. Whipple*, 6 Vt. 94; *Baker v. Windham*, 13 Me. 74; *Fiske v. Hazard*, 7 R. I. 438; *Sherman v. Carr*, 8 id. 43; *Brainard v. City of New London*, 22 Conn. 552; *Webster v. Town of Harwinton*, 32 id. 131; Dillon on Municipal Corporations, § 98.

The attempt at indemnity in this case is only made by the common council, with no authority or approval of the corporation; but if it had been in fact expressly authorized and approved by the citizens, in a meeting called and held with the requisite formality, the rights of the minority of tax payers, however small, would be entitled to protection through the form of remedy which the petitioner has invoked.

We advise the Superior Court to decree that the injunction be made perpetual.

In this opinion the other judges concurred.

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RYAN V. THE WORLD MUTUAL LIFE INSURANCE COMPANY.

(41 Conn. 168.)

Life insurance — fraud of agent in writing answers of applicant.

The agent of a life insurance company who had authority to receive and forward applications and countersign and deliver policies approved by the company and to collect premiums, fraudulently put down answers to material questions in the application which were untrue and were not the answers given by the applicant. The applicant signed the application without reading it and the company issued the policy, which was conditioned that the statements in the application were true. *Held*, that the insurers were not bound by the policy.

ASSUMPSIT on a policy of insurance on the life of Patrick Ryan. for the benefit of the plaintiff; brought to the Superior Court in New London county, and tried to the jury before FOSTER, J. Verdict for the plaintiff, and motion for a new trial by the defendants for error in the rulings of the court and on the ground that the verdict was against the evidence. The case is sufficiently stated in the opinion.

W. P. Prentice, of New York, and *S. C. Dunham*, in support of the motion.

Pratt and Ripley, contra.

CARPENTER, J. This is an action on a policy of life insurance. The policy is expressed to be "in consideration of the representations, declarations and covenants contained in the application therefor, to which reference is here made as a part of this contract," etc. It is further declared that "This policy is issued and accepted on the following express conditions and agreements: First. That the statements and declarations made in the application therefor, and on the faith of which it is issued, are in all respects true," etc. The application therefore is a part of the policy; and the plaintiff's agreements therein contained are warranties and, if not true, she cannot recover, unless there has been a waiver by the defendants, or under the circumstances they are estopped from denying their truth.

In the application are the following questions and answers:

"12. Has the party ever had any of the following diseases" — (naming a long list of diseases, and among them), "bronchitis, consumption, spitting of blood, or any serious disease?" — "None of these."

"17. Has the party had during the last seven years any severe sickness or disease? If so, state the particulars, and the name of the attending physician who was consulted and prescribed." — "No."

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"25. Has the party employed or consulted any physician? Please answer this yes or no. If yes, give name or names and residence."—"No."

"27. Has any previous examination or application been made for assurance on the life proposed?"—"No."

"Has any company declined to issue a policy for the party?"—"No."

Upon the trial the plaintiff offered to prove, not that the above answers were true, but that different answers were in fact given, both by herself and the insured, and that the answers were wrongly written by the local agent of the defendants without the knowledge or consent of the plaintiff or her husband. Aside from the claim that the defendants are responsible for the conduct of their local agent, this is merely an attempt to substitute for a part of the written contract declared on, a different parol contract; for the representations and warranties of the plaintiff contained, in the written agreement, oral representations and warranties of an entirely different character. It requires no argument to show that this cannot be done.

But the plaintiff claims that truthful answers having been given to each interrogatory, and the incorrect answers contained in the application being there by the sole act of the agent, the defendants are bound by the answers as written, and are precluded from denying their truth. Whether this is so or not depends upon the extent of the agent's authority.

It must be admitted that the express authority of the agent was limited to receiving the application, forwarding it to the home office, receiving, countersigning and delivering the policy, and collecting the premiums. The courts in this State have construed the powers of these agents liberally, and extended them somewhat by implication. Thus, it has been held that in writing the application, and explaining the interrogatories and the meaning of the terms used, he is to be regarded as the agent of the company. In *The Union Mutual Ins. Co. v. Wilkinson*, 13 Wallace, 222, it was held, where an agent by mistake, or acting upon information derived from others which proved to be incorrect, inserted an answer not true in fact, that it was the act of the insurers and not of the insured.

In this case we are asked to go further than any case has yet gone, and clothe the agent with an authority not given him in fact, and to hold the principal responsible for an act which could not by any possibility have been contemplated as being within the scope of the agency. In most, if not in all, of the cases in which the act of the agent has been regarded as the act of the principal, the act has been the natural and probable result of the relations existing between the parties, or so con-

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nected with other acts expressly authorized as to afford a reasonable presumption that the principal intended to authorize it. But it cannot be supposed that these defendants intended to clothe this agent with authority to perpetrate a fraud upon themselves. That he deliberately intended to defraud them is manifest. He well knew that if correct answers were given no policy would issue. Prompted by some motive, he sought to obtain a policy by means of false answers. His duty required him not only to write the answers truly as given by the applicant, but also to communicate to his principal any other fact material to the risk which might come to his knowledge from any other source. His conduct, in this case, was a gross violation of duty, in fraud of his principal, and in the interest of the other party. To hold the principal responsible for his acts, and assist in the consummation of the fraud, would be monstrous injustice. When an agent is apparently acting for his principal, but is really acting for himself, or third persons, and against his principal, there is no agency in respect to that transaction, at least as between the agent himself or the person for whom he is really acting and the principal.

The principal reason urged for holding the defendants liable in this case is the one suggested in the argument, that when one of two innocent persons must suffer by the fraud, negligence or unauthorized act of a third, he who clothed the third with the power to deceive or injure must be the one.

Our answer is, in the first place, that this is not exactly a case in which one of two innocent persons must necessarily suffer. There is no absolute loss for us to determine on whom it shall fall. If the plaintiff fails to recover she sustains no pecuniary loss, except the premium paid, nor that even if she is innocent and the law is so that she can recover it back on the ground that there was a failure of consideration. It is unlike a case of fire insurance. Nearly all property may be insured at some rate, if not in one office in another. But in this case the plaintiff's husband was not an insurable subject. His situation was such that one company had rejected him, and but for the aid of fraud neither this nor any other company would have accepted him. Had the truth been stated no policy would have issued, and as she would have had no better success probably with other companies, we cannot see that she has been misled to her prejudice except in relation to the premium, which is comparatively a small matter.

In the second place, if the rule is to be applied to this case, it is by no means certain that it will aid the plaintiff. The fraud could not be perpetrated by the agent alone. The aid of the plaintiff or the insured,

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either as an accomplice or as an instrument, was essential. If she was an accomplice, then she participated in the fraud, and the case falls within the principle of *Lewis v. The Phoenix Mutual Life Ins. Co.*, 39 Conn. 100. If she was an instrument, she was so because of her own negligence, and that is equally a bar to her right to recover. She says that she and her husband signed the application without reading it and without its being read to them. That of itself was inexcusable negligence. The application contained her agreements and representations in an important contract. When she signed it she was bound to know what she signed. The law requires that the insured shall not only, in good faith, answer all the interrogatories correctly, but shall use reasonable diligence to see that the answers are correctly written. It is for his interest to do so, and the insurer has a right to presume that he will do it. He has it in his power to prevent this species of fraud and the insurer has not.

But more than this. The conduct of the plaintiff at the time and subsequently is not entirely free from suspicion. There is some evidence tending to prove that she knew of the deception. She testifies that her husband, at the time the application was signed, told the agent several times that he had been rejected by the Massachusetts Mutual, *but that the doctor told him to say nothing about it.* After the doctor had paid the premium, she hesitated about re-paying him, fearing that the policy would not be good, and even sent her daughter to request him to take the policy away. Thereupon the doctor and agent assured her *that it was all right in the application.* Upon that assurance she paid the premium. This, if it falls short of proving actual collusion, shows clearly that she comprehended the importance of the answers, and exhibits her negligence in a stronger light. On the whole we think that she, quite as much as the defendants, clothed this agent with the power to perpetrate the fraud. Courts should never extend by implication the power of an agent except to carry into effect the probable intention of the parties, or to prevent third persons dealing with the agent from being misled to their injury. In this case there is no ground for the supposition that the defendants ever intended to authorize the agent to act directly contrary to their interests; and if the plaintiff has been deceived her own negligence at least materially contributed to it.

We need not enlarge upon the evils necessarily resulting from holding insurance companies liable for such acts of their agents. The question is vital to the insurance interests of the country. The insured no less than the insurers are deeply interested in it. If this verdict is sus-

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tained it will tend to establish a principle fraught only with mischief. Every life insurance company in this country, and to some extent the fire insurance companies, will be at the mercy of their agents. A door will be opened for fraud, collusion, and legal robbery, unprecedented in the history of jurisprudence. In view of the probable consequences of such a principle — evils co-extensive almost with the magnitude of the interests involved — we ought to pause and consider well before extending the doctrine of some of the modern cases to a case like this.

We are constrained therefore to hold that a limited agency in a case of life insurance will not be extended by operation of law to an act done by the agent in fraud of his principal, and for the benefit of the insured, especially where it is in the power of the insured by the use of reasonable diligence to defeat the fraudulent intent.

The court very properly instructed the jury that “an untrue or fraudulent statement or denial made by the applicant of a fact material to the risk to induce the insurance of a policy will prevent the policy from taking effect as a valid contract, unless the insurer has in some way waived or estopped himself from relying upon such misstatement to avoid the policy. This waiver, to be effectual, must be made by an officer of the company authorized to make it. If there has been no evidence of any waiver except by a medical examiner of the company, or by a local agent, there must be an additional proof of specific authority given them or the company will not be bound.”

Some of the cases cited by the plaintiff are cases of fire insurance, in which the agents were intrusted with blank policies, signed by the president and secretary, and had full power to fill up and issue the same without referring the application to the home office. In such cases the corporation contracts solely by its agent. The acts and knowledge of the agent are the acts and knowledge of the corporation, and there is a manifest propriety in holding the corporation liable accordingly.

This court has held that in writing the answers to the interrogatories in the application, the agent is to be regarded as the agent of the company rather than the agent of the insured. We do not question the propriety of those decisions, considering the circumstances of the cases in which they were made; but we cannot regard them as establishing an inflexible rule of law applicable to all cases.

A brief reference to some of the cases will illustrate the distinction which we make. When the applicant stated fully and truthfully the circumstances relating to the title to the property insured, and the agent, knowing all the facts, but for the sake of convenience, stated the title incorrectly and issued a policy, it was held that the company

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could not take advantage of it. The court regarded the transaction as equivalent to an agreement that, for the purpose of the insurance, the title should be by the agent. *Peck v. New London County Mutual Insurance Company*, 22 Conn. 575. See also *Woodbury Savings Bank v. Charter Oak Insurance Company*, 31 id. 517.

When the applicant answered the interrogatory, "Is a watch kept on the premises during the night?" by stating the facts, and the agent wrote the answer, "Watchman till 12 o'clock," which answer was not strictly true, it was held that the company was bound by it. *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465. See also *Beebe v. Hartford County Mut. Fire Ins. Co.*, id. 51; *Hugh v. City Fire Ins. Co.*, 29 id. 10.

The case before us is a case of life insurance. The power of the agent was in fact limited. He had no power to issue policies. The terms of his agency conferred no authority to waive conditions or forfeitures, or to agree to false or fraudulent answers to any of the interrogatories, or to make any other contract to bind the company. Presumptively the insured and the plaintiff knew all this before paying the premium; for the printed policy, which was in their hands for several days, contained at the bottom this note: "The president and secretary of the company are alone authorized to make, alter or discharge contracts, or to waive forfeitures." The jury then were correctly told that "there must be additional proof of special authority given them" (the local agent and the medical examiner), "or the company will not be bound."

The jury found such special authority. But we look through the record in vain to find any evidence to support such a finding.

The verdict was manifestly against the evidence, and justice requires that it should be set aside and a new trial awarded.

In this opinion the other judges concurred; except FOSTER, J., who, having tried the case in the court below, did not sit.

WORTHINGTON v. THE CHARTER OAK LIFE INSURANCE COMPANY.

(41 Conn. 372.)

Life Insurance — effect of non-payment of premium by reason of war.

Where a policy of life insurance is conditioned to be void on the non-payment of the annual premium, a failure to pay such premium, caused by the intervention of war between the territories in which the insurance company and the insured respectively reside, avoids the policy and it is not revived by a tender, after the war, of the unpaid premiums with interest. (See note, p. 512.)

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ASSUMPSIT on a policy of life insurance. The declaration stated in substance that on the 14th of January, 1854, the defendant, a life insurance corporation chartered and located in Connecticut, insured by a policy issued by the company and countersigned by their agent in Greenville, South Carolina, through whom the insurance was effected, the life of Lewis Worthington, then and after a resident of said Greenville, in the sum of \$1,000, payable on the decease of said insured, to this plaintiff, the wife of said Worthington. The policy contained the usual provision, that if the annual premiums were not paid on or before the times fixed in the policy for such payment, the company should not be liable to pay the sum insured. The annual premiums were paid to the agent at Greenville until 1860, when he was withdrawn, and the premiums for that and the next year were remitted to the company in Connecticut. When the premium for 1862 fell due the State of South Carolina, with the other Southern States, was in rebellion against the general government, and the President of the United States had by proclamation declared a state of war to exist and had forbidden all commercial intercourse between the citizens of the loyal and those of the rebellious States, and from that time till the close of the war in 1865 no premiums were paid on the policy. At the close of the war the insured tendered to the company the amount of the unpaid premiums and interest, but the company refused to receive them or to acknowledge any further liability upon the policy. No further premiums were paid. In 1869, the insured died, and the plaintiff brought a suit upon the policy, claiming the amount of the same, after deducting the unpaid premiums.

The defendant demurred to the sufficiency of the declaration and the case was reserved upon the demurrer for the advice of this court.

H. H. Barbour & H. S. Barbour, with whom was Storrs, in support of the demurrer.

Buck, contra.

CARPENTER, J. This is an action on a policy of life insurance. The declaration sets out the policy, alleges the payment of the annual premium up to January 14th, 1862, the non-payment and an excuse for non-payment for that and the succeeding years, the death of the insured, proofs of death, and a refusal to pay. To the declaration there is a demurrer. The sufficiency of the declaration depends upon the legal effect of the non-payment of the premiums, considered with reference to the facts alleged as an excuse.

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A contract of life insurance is a peculiar contract. It has no parallel and few analogies in all the business transactions of life. An ordinary life policy, like the one in suit, requiring the payment of annual premiums, consists of two parts, and is divisible. The applicant, upon the payment of the first premium, effects an insurance upon his life for one year, and purchases a right to continue that insurance from year to year, during life, at the same rate. Whether he will continue it or not is optional with him. The premium for the first year pays for the risk during that year, and for the right to subsequent insurance. The rate of insurance for a single year is less than the annual premiums on a life policy. The difference, continued, as it is supposed it will be, from year to year through life, may be regarded as the consideration for the right to continue the insurance.

As the time for which the party was insured by the actual payment of premiums had expired before his death, the case turns entirely upon the second part of the contract. In respect to that, what relation did the contracting parties sustain to each other? The defendants, for a valuable consideration, made an irrevocable proposition to insure the applicant during life, upon certain terms and conditions. He was at liberty to accept or reject the proposition. If he accepted, he was to comply with the condition and pay the premium on or before a given day. If he neglected to pay within the time limited, according to the letter of the contract, he virtually rejected the proposition, and the contract was at an end.

In terms, the contract is a very simple one. The defendants, in effect, say to the other party, "Pay at the time stipulated and you are insured; omit such payment and our proposition is withdrawn, and your right to insure is extinguished." It is impossible to put any other construction upon it. There is no room for doubt or uncertainty. The payment required is in no sense conditional. The proposition is not, pay if convenient; pay unless sudden sickness prevents; pay unless some unexpected turn of fortune deprives you of the means of paying; pay unless the act of God or the law intervenes to prevent payment; but absolute payment is required. To make it still clearer, the proposition is not, if poverty, sickness, accident, or the law prevents payment, you shall be insured the same as if you had paid. None of these risks were taken by the defendants; they were all taken by the insured. Every word of the instrument, embodying the agreement of the parties, is consistent with this view of the contract, and the whole instrument, when fairly considered, is inconsistent with any other view of it. It would seem that this analysis of the contract would of itself be a sufficient answer to the plaintiff's claim.

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But courts of high standing, both of our sister States and of the United States, have viewed these contracts differently, and have come to a different result. They vary somewhat, however, in the reasons for their conclusions.

The case of *Hilliard v. New Jersey Mutual Benefit Life Insurance Company*, 35 N. J. 415, interpolates in the contract a provision, that if the law rendered the payment of the premiums impossible at the time, the insured was excused from paying, and might save the insurance by paying it subsequently.

In *Hamilton v. Mutual Life Insurance Company*, 9 Blatchford, 234, one reason given, among others, is, that the contract imported an agreement by the company to keep an agent in the State where the insured resided — one of the seceded States — during the war ; and that the withdrawal of that agency was a wrongful act, which excused the insured from paying and saved the insurance.

In the case of *Manhattan Life Insurance Company v. Warwick*, 20 Gratt. 614; S. C., 3 Am. Rep. 218, importance is attached to the local law of Virginia, which, as is held, required the company to keep an agent in that State during the war, to whom premiums could be paid, and that payment to him in one instance, although not strictly in the mode prescribed in the contract, and in another instance a tender of payment during the war, and after the authority of the agent had been in form at least revoked, operated to keep the policy alive.

In the case of *Clopton v. The New York Life Insurance Company*, 7 Bush, 179 ; S. C., 3 Am. Rep. 290, stress is laid upon the hardship of the case if the forfeiture is enforced.

We do not attempt to give all the points considered, nor even the substance of the argument ; for in all the cases the whole question is elaborately discussed. Other points, however, and some of the arguments will be more fully noticed as we proceed. A due regard to these various decisions, and others of like import, requires us to examine with care the law bearing upon this case.

1. It will be seen from what has already been said, that we regard the payment of the premiums as a condition precedent to any subsequent liability on the part of the defendants. If this had been an absolute contract by the insured to pay a sum of money by a given time, neither accident, inevitable necessity, nor the act of God, would excuse a non-performance. But if payment was unlawful, that would be an excuse. *School District v. Dauchy*, 25 Conn. 530. But that doctrine has no application to a case where it is at the option of the party to do or not to do the thing contemplated. He has a perfect right to do it or not to do

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it. He needs no excuse, whatever his action may be. The question is, if he omits to perform, from any cause whatever, does he thereby obligate the other party precisely as he would if he had performed? The answer to this question must be found in the contract itself. By a reference to it, it will be seen that there is nothing in it which gives the slightest indication that such was the intention of the parties, and there is no legal ground on which we can interpolate in the contract such a provision. We venture to say that no precedent can be found for such action by a court of justice, prior to some of the recent decisions upon this subject. If any such exist they have escaped our notice. We cannot, therefore, accept as sound the doctrine that the existence of the war, making it illegal to pay the premiums, saved the rights of the party and kept the policy in force.

2. The ground taken, that the late civil war was such an extraordinary event, and so entirely unlooked for, that it will be presumed that it was not contemplated by the parties, and therefore the law will imply a qualification of the conditions in case of war, is hardly tenable. In the first place, the policy itself provides that the insured shall not, without the previous consent of the company, "enter into any military or naval service whatsoever, the militia not in actual service excepted." So that, in this case, war was in the minds of the parties, and therefore there would seem to be no room for the supposed presumption. On the contrary, the fact that war is clearly referred to shows that the parties contemplated a state of war as possible; and the fact that the qualification contended for is not inserted, affords some ground for presuming that the parties did not intend such a qualification.

But aside from this — assuming that the possibility of a war between the sections was not contemplated by the parties — is it clear that the law will imply the modification of the contract contended for? In the case of written contracts, the law will imply nothing except what may fairly be presumed to have been intended by the parties. Hence, if an unlawful act is embraced in general words used in a contract, the law will presume that the parties did not intend it, and will imply an exception. A case in one of the English reports affords an illustration. A contract of marine insurance insured against capture. The vessel was captured by the government of the insurer. It was held that the capture, although within the letter of the contract, was not within its true meaning, on the ground that an express contract insuring against such capture would be void as against the policy of the government, and therefore the law presumed that the parties intended that such a capture should be excepted.

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But what reason is there for presuming an exception in the present case? It cannot be presumed from the mere fact that the act to be done, which was lawful when the contract was entered into, had unexpectedly become unlawful. That may have been a good reason why the insured, in exercising his right of election, should elect not to pay the premiums; but it certainly affords no ground for presuming that the parties intended in such a case that he should have all the advantage of an actual payment.

The business of life insurance has grown to immense proportions in the last fifty years. During that time it has engaged the attention of many of the best minds in this country and in Europe. It has been studied from every possible stand-point, and considered with reference to every possible vicissitude in human affairs, including a state of war as well as peace. Every element that enters into the chances of human life, and that affects the risk assumed, has been well considered and reconsidered, and the policies of all well-regulated companies have been prepared with great care, with a view to express clearly the precise intention of the parties, and to guard the rights of all concerned. With all the light that experience and thought have thrown on this subject, it never has occurred to any one connected with the business, so far as we know or believe, that a clause of this kind was needed to protect the rights of any one. On the contrary, we venture to assert that a life insurance policy containing a provision that in case of war between the government of the insured and the government of the insurer, the policy should be continued in force during the war, without the payment of the premiums, would be unprecedented in the history of life insurance; and if a court of justice construe the contract as meaning that, they impute to the parties a meaning which they did not intend; for it cannot be presumed that any company, managed by intelligent men, would knowingly and understandingly make such a contract.

3. In two of the cases referred to, the decision rests in part upon an interpretation of the contract, which injects into a provision binding the company always to keep an agent in the State in which the insured resided, with authority to receive the annual premiums, and that the withdrawal of the agency was a breach of the contract by the company, which estopped the company from setting up the non-payment of the premiums as a defense. It is not pretended that policy itself contains any language that will bear such a construction; but the obligation is inferred, partly from the circumstances under which the contract was entered into, and partly from the law of the State in which the contract was made, requiring all foreign companies doing business in the State to

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keep an agent there to file certain sworn statements in public offices, etc., and accept service of process against the company.

So far as the present case is concerned, we might dismiss this point with a simple allusion to the fact that the law of South Carolina is not made a part of this case; and that so far as the inference is one of fact it hardly falls within the province of this court. But we choose not to rest our decision upon any narrow or technical ground.

We shall, therefore, assume that the laws of South Carolina in this respect are substantially like the laws of Alabama and Virginia, and treat it simply as a question as to the proper construction of a written instrument, taking into consideration the local law and the circumstances attending the case. The obligation inferred is hardly a proper subject of legal inference. Whether the premiums should be paid in South Carolina or Connecticut was a matter of indifference to the law. To justify a court of justice in drawing such an inference, the circumstances should be very strong. In this case they seem to be rather weak. The fact that the contract was made with, and the premiums paid to, an agent of the company in South Carolina, coupled with the fact that the insured, with the knowledge and consent of the company, always resided there, affords very slight grounds for presuming that the parties contracted that the defendants should always, and under all circumstances, during the life of the policy, keep an agent there for that purpose. On the other hand, the fact that the parties contracted expressly in reference to the time of payment, and the receipt to be given therefor, and were silent in respect to the place of payment, affords some presumption that they intended to leave that matter to be regulated by their mutual convenience. To us, the latter presumption seems much stronger than the former.

The principal if not the only provision in the statute which bears upon the question is that which requires a sworn statement of the gross premiums received for insurance by the company at the agency during the preceding year to be annually deposited with the accessor. This was undoubtedly for the purpose of taxation, and is some indication that the legislature intended that the premiums paid by citizens of the State should be paid through the agency, that they might be reached for that purpose. If the legislature intended this it is a little surprising that they did not express that intention in plain language, instead of leaving it to be implied from language which may, with equal propriety, bear another construction, and be operative without resorting to the implication. This and other requirements of the statute were only operative in case the defendants chose to transact business in the State, and only so long as they continued to do so. There is nothing which, even by impli-

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cation, requires them to begin business, and there is not enough to justify the inference that they intended to compel the continuance of business when once begun. Taking the statute and the circumstances together, the interpolation of such a provision in the policy seems more like the creation than construction of a contract.

But let us test this interpretation by its fruits. The agency is continued during the war that the policy-holder may there pay his premiums from year to year. The moment the agent receives it, it is subject to the confiscation act, and immediately finds its way into the Confederate treasury. This is conceded; and the learned judge, in *Hamilton v. Mutual Life Insurance Company of New York*, attempts to evade the force of it by suggesting, on page 256, that the insured "could have tendered the premium, and the agent could have refused to receive it because he could not remit it and because it would be confiscated." In that event, we apprehend that a shrewd and sagacious government would not have been long in discovering that the insured held funds belonging to a northern institution; and vigilant collectors would soon have destroyed all hope that he could keep them for the benefit of the creditor until after the termination of the war. If the Confederate government had determined to devise a plan by which they could draw funds from the loyal people of the North to aid in carrying on the rebellion, they could hardly have devised a more ingenious or more successful one than this. The success and magnitude of such a scheme will be apparent when we consider that probably every life insurance company in the country had agencies in the seceding States; and that the number of policy-holders was so large as to justify the belief that the flow of money through this channel into the treasury of the Confederacy would have been constant and unremitting. And then, to trace the results still further, after the termination of the war, and the policy-holders have paid to the rebel government the premiums for four successive years, suits are brought on the policies, and courts of justice are gravely asked to hold the companies liable, and that too without any abatement on account of the premiums which the companies did not receive. Such are some of the consequences to which this argument inevitably leads.

But again; let us briefly consider the effect of the war upon such a contract as is here contemplated. It is now supposed to be a contract containing mutual obligations. The defendants undertook to keep an agency in South Carolina, and the insured, if he would continue his policy, undertook to pay his premiums at such agency. It must be remembered that the obligation to keep an agency is inferred partly from the previous course of business, and if it exists at all it obliges them to

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continue the agency during the war substantially as before. It must also be borne in mind that it is not a rule for an isolated case, but it is applicable to all life insurance companies, and all their agents, and to every policy in the seceding States. In theory, and before the war such it was in fact, the business of the agency is to negotiate and secure new policies and receive premiums as they become due on outstanding policies. The agents are required to report their proceedings and make remittances at short intervals to their northern principals and receive instructions from them. Practically the whole business of the agency is interrupted and destroyed, and the agent is reduced to a mere figure-head without duties or powers, to whom each policy-holder may annually go through with the form of tendering his premium. Every possible advantage to the company from the agency is destroyed, and the agency, which is judicially required, is radically and essentially different from any thing which either party ever contemplated. Is that just? Is it not much more reasonable to hold, and does it require any argument to show, that such a contract is entirely abrogated by the war? Every argument and every reason that can be urged for the abolition of a contract of partnership or of affreightment applies equally well to such a contract as this. It becomes a contract of continuing performance in the strictest sense.

4. But it is said that the non-performance of a contract will always be excused when the intervention of the law forbids one party from performing and the other party from receiving performance. This is doubtless a sound proposition. But the difficulty is, it does not aid the plaintiff. The real question is, not whether the party is excused from performing, but what are the consequences of not performing? In one of the cases the court says: "Their" (the defendants) "inability to receive the premium when due amounted to the same thing as if the premiums had been actually tendered and the defendants had refused to receive them." With all deference we submit that this cannot be true as a general rule. No case occurs to us in which it would be true when applied to an unconditional contract. To illustrate: a man contracts to erect for another a wooden building at a given place on or before a given day. Before performance the act becomes unlawful, by city ordinance, for example, forbidding the erection of wooden buildings in that locality. Non-performance would certainly be excused, but his legal excuse would give him no right under the contract. No action could be maintained against him for not erecting the building, and it is equally true that he could maintain no action against the proprietor for the price agreed to be paid, nor for damages for not permitting the erection of the proposed building. The law having annulled the contract, both parties are absolved from all

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obligation under it. Therefore it is not true that the parties would stand as they would if performance had been lawful, and there had been a tender of performance and a refusal. Neither is the proposition a sound one in its application to the case under consideration. Let us lay aside the existing insurance, and consider the contract solely in reference to the future. The defendants say to the insured, "Pay us so much money on or before a given day, and we will insure your life a given sum for one year from that day." The defendants' undertaking is a conditional one. If the other party does not pay no obligation attaches. Before payment, and on the day named, the law absolutely prohibits the one party from paying, and the other party from receiving pay. It cannot be true that that would be equivalent to payment; or, assuming that there is no legal impediment, a tender of payment and a refusal. If it is, then the law excuses one party from paying the consideration, and yet gives him the benefit of the contract precisely as if he had paid. It deprives the other party of the consideration, and converts a conditional promise into an absolute one without performance of the condition.

It is no answer to say that the premium may be subsequently paid or allowed when the policy is collected. The parties have a right to make their own contracts, and courts have no power to vary them or make contracts for them. They have fixed the time of payment and made it material. *Time is of the essence of the contract.* The law will no more postpone the payment in such cases than it will deprive the party of it entirely. In this as in unconditional contracts, the law having intervened to prevent performance, there is no contract and no liability attaches to either party.

The only possible answer to this view of the case that we can conceive of is, that the insured had a vested interest in subsequent insurance in consideration of the premiums paid for the preceding years, of which the law will not deprive him. If the law is driven to the alternative — either to destroy that right or vary the contract, or rather make a new one for the parties,—we submit that the former is less objectionable than the latter. For the latter we have no precedent, and there is no limit to the mischief which will follow the introduction of such a principle into our system of jurisprudence. In respect to the former, it is neither the first nor the only instance in which war destroys private rights and vested interests. But no such alternative exists. It is not strictly correct to say that the law deprives the insured of a vested right. The law simply enforces, according to its letter and spirit, the contract which the party made. If that works a forfeiture, the hardship is attributable to the contract and not to the law. Neither the defendants nor

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the law guaranteed that performance by the insured should always be lawful.

Thus far in considering this point we have assumed that the law directly prohibited the payment of this premium. But such is not the fact. Payment in itself considered was not unlawful. The law simply prohibited intercourse between enemies. As a consequence payment which required such intercourse was prohibited. If payment could be made without such intercourse it was perfectly lawful. Such payment was certainly possible. Had the insured come into the northern States and remained here, or employed an agent, as he had an opportunity to do (for war, as a coming event, cast its gloomy shadow before, especially in South Carolina), he, or his agent, might have paid, and the defendants might have received, the premiums without the violation of any law whatever. We cannot, therefore, attribute to the law consequences which the party, by his own act, has brought upon himself.

5. In *Clopton v. Fire Insurance Company*, 7 Bush, 179 ; S. C., 3 Am. Rep. 290, the court attaches importance to the supposed hardship of a forfeiture. It says: "However lawful the conditions of avoidance, as prescribed in this case, may be admitted to be, it is in effect a forfeiture, which ought not to be favored. To subject to forfeiture all the premiums paid, as well as the five thousand dollars for the loss of life, would be harshly and unreasonably penal for no better cause than the inevitable non-precise payment of another installment of premiums, which the law prevented the appellant from a right to receive. None of the parties can be presumed to have contemplated such disabling war, or to have intended, by the condition of avoidance, more than voluntary failure to pay when there was legal ability to receive the premiums."

The rule of law that forfeitures are not favored is a salutary rule, and we have no disposition to weaken its force. We should be careful, however, to guard against its misapplication. In respect to contracts, it is usually if not universally applied to cases in which the party, by doing or omitting to do some act, forfeits an estate or a sum of money, *in addition to losing the advantages of the contract*. This is the first instance within our knowledge in which it has been applied to give the party the benefit of the contract without performance on his part. We contend that this is not such a forfeiture as calls for or admits of the application of the rule. One man cannot forfeit the property of another. The thing forfeited must be his own. The argument assumes that the plaintiff had a vested right to the sum insured for ; whereas he had no such right, not even contingently, unless he continued to pay the premiums. In this case the insured failed to pay the premiums, consequently he had no

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vested right to the insurance. Therefore there was no forfeiture, in the proper sense of the word, in respect to that.

The court also speaks of forfeiting the whole amount of premiums previously paid. This is only partially true. To a considerable extent he received a valuable consideration for the amount paid, in the risk which the company assumed during the time the policy was in force. So that the real loss by a failure to pay is comparatively small. And the possibility of such a loss must be presumed to have been in the minds of the parties when entering into the contract, and considered by them accordingly. The possibility of a failure to pay was provided for in the provision in such case that "all payments made thereon shall be forfeited to the said company." In a hazardous contract that was a risk which the insured assumed. It is not, therefore, such a forfeiture as courts of equity will relieve against, much less will courts of law make a contract for the parties for the purpose of avoiding it.

Again, if this principle is to be applied to life insurance policies, there is no reason for limiting the application to cases of war. There is the same hardship, and, therefore, the same propriety in applying the rule to cases where the party, by accident, misfortune, or inevitable necessity, fails to pay the premiums. To apply the rule in such cases would make the companies insurers against all such contingencies, and that certainly will not be seriously claimed. This rule, too, if applicable at all, must be applied in all cases, whether few or many premiums have been paid. There is no room or reason for a distinction between the payment of one and many, except that each payment slightly increases the value of the right acquired. If but a single payment had been made, would any court seriously consider the propriety of straining the law or the contract for the purpose of saving a forfeiture?

But this is not all. The application of this doctrine to cases where the payment of the premiums has been interrupted by war fails to take a comprehensive view of the question at issue. It looks only to the immediate parties to the suit, and regards the policy as an isolated transaction; whereas, in fact, it is but one act, a small fraction indeed, of a vast system of business. It is a business, too, which is based upon a calculation of chances and a system of averages. The average duration of any number of insurable lives may be estimated with tolerable accuracy, and each person, of whatever age, in a healthy condition, has his "expectation of life," which is known and relied upon. Some exceed and some fall short of the average. Hence, some pay more, some less; but the sum insured is the same, whether few or many premiums are paid. The company receives on one policy, in premiums and interest, more

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than it pays ; on another, much less ; but individual policies are not regarded ; it is the average duration of life and the result of the business as a whole.

The proportion of those who will allow their policies to be forfeited is also a matter of calculation, and can be determined with reasonable certainty in advance. It is doubtful, however, whether these forfeitures operate in the end to the advantage of the companies. As a rule, the policies which lapse are the best risks for the insurer. As they drop out, the average of those which remain is materially reduced. But whether they gain or lose is not material. In ordinary times, the consequences of forfeited policies can be anticipated and provided for. The late war caused all policies subject to its operation to lapse temporarily. It will probably be found that a few only returned to pay their premiums at the close of the war. Of those, most, if not all, are cases in which the insured either died during the war, or survived it in impaired health. The application of the rule we are now considering to this class of cases, therefore, practically revives only the very worst risks for the company, and compels it to submit to the loss of all the better and more desirable risks. A court of justice should never relieve one party of a hardship, apparent or real, at the expense of the other. By so doing, possibly the court may impose a greater hardship than the one it relieves. If the contract relations of two persons are such that one or the other must suffer a hardship, each party being equally free from blame, the law will leave it precisely where the contract places it.

Let us consider the consequences of this doctrine to a single company. A large number of policies, many thousands perhaps, were outstanding in the seceding States. Some policy-holders, doubtless, lost their lives in the field. In respect to them, the company is exempt from liability. Others were non-combatants. Of these, some, probably a small part of the whole, died during the war, or since. In all such cases, especially where the premiums were paid or tendered immediately after the war, the company will be called upon to pay the insurance. But in the greater number of cases, where the holders of policies survived the war in health, the company has no means of compelling them to revive their policies and pay the arrearages of premiums, but must content itself in seeing them exercise their right of election by refusing to continue the old policy, and taking a new one, thereby saving several years' back premiums. Now, if some means could be devised whereby all the policies held by non-combatants could be revived at the close of the war, and the payment of arrearages be compelled, there would be some justice in holding the company liable in those cases where the policies have

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terminated by the death of the insured. But a rule of law which revives and enforces all those policies in which all the advantages are against the company, and leaves null and void all those policies in which the advantages are in favor of the company, is neither reasonable, befitting, nor just.

6. One other question remains to be considered. To what extent was this policy abrogated by the war? The general principles of international law, which determine the effect of war upon existing contracts, are well established, clearly defined, and not difficult of application. In the case of *The Rapid*, 8 Cranch, 155, JOHNSON, J., in speaking of the nature and consequences of a state of war, says: "On this point there is really no difference of opinion among jurists; there can be none among those who will distinguish between what it is in itself, and what it ought to be under the influence of a benign morality and the modern practice of civilized nations. In the state of war, nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent States exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat." After speaking of some rules which have been introduced into modern warfare, and which owe their existence altogether to mutual concessions, he adds: "On the subject which particularly affects this case, there has been no general relaxation. The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because the enemy of his country." Again, on page 162, he says: "But the object, policy and spirit of the rule is, to cut off all communication or actual locomotive intercourse between individuals of the belligerent States. Negotiation or contract has, therefore, no necessary connection with the offense. Intercourse inconsistent with actual hostility is the offense against which the operation of the rule is directed; and by substituting this definition for that of trading with an enemy, an answer is given to this argument."

In *Griswold v. Waddington*, 16 Johns. 479, Chancellor KENT, referring to the case of *The Rapid*, says: "Here then we have the final consummation of this discussion, and the sanction of the doctrine we have been tracing, solemnly given by the highest judicial authority in the United States. It reaches to all interchange, or transfer, or removal of property, to all negotiations and contracts, to all communications, to all locomotive

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intercourse, to a state of utter occlusion, to any intercourse but one of open hostility, to any meeting but in actual combat."

In the case of *The Julia*, 8 Cranch, 181, Judge STORY is equally explicit. On page 193 he says: "At the threshold of this inquiry, I lay it down as a fundamental proposition, that strictly speaking, in war, all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the government, or in the exercise of the rights of humanity. I am aware that the proposition is usually laid down in more restricted terms by elementary writers, and is confined to commercial intercourse."

Again, on pages 194-195, he says: "But independent of all authority, it would seem a necessary result of a state of war, to suspend all negotiations and intercourse between the subjects of the belligerent nations. By the war every subject is placed in hostility to the adverse party. He is bound by every effort of his own to assist his own government, and to counteract the measures of its enemy. Every aid therefore by personal communication, or by other intercourse, which shall take off the pressure of the war, or foster the resources, or increase the comforts of the public enemy, is strictly inhibited." * * * * "The ground upon which a trading with the enemy is prohibited is not the criminal intentions of the parties engaged in it, or the direct and immediate injury to the State. The principle is extracted from a more enlarged policy, which looks to the general interests of the nations, which may be sacrificed under the temptations of unlimited intercourse, or sold by the cupidity of corrupted avarice."

We are aware there is a tendency in modern times to soften the rigors of the war, and relax the principles of international law, so far as they affect private property and rights. On this subject Chancellor KENT, in *Griswold v. Waddington*, says: "It is the business of government, and not of courts of justice, to relax the rules of war. The power that declares or carries on war may soften its evils, to every extent consistent with the public interest, of which it is in this instance the exclusive judge. It is its bounden duty to make war fulfill its end with the least possible mischief, and to hasten the blessings of peace." This is sound doctrine and throws all the responsibility where it properly belongs — upon the war-making power. It is the business of the courts to administer international law, and not to relax or modify it according to their notions of propriety. It is much wiser and safer to leave that matter with the power that makes and carries on the war. But we need not dwell longer upon the general principles which govern this case.

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The law as stated above is pretty uniformly accepted by the modern cases as the established doctrine of this country. They differ somewhat in its application. The difficulty in applying it to a policy of life insurance arises from the complex nature of the contract. There are cases which regard it as a contract of continuing performance, and therefore dissolved by war. Others consider it a contract of periodical performance, and affected as the payment of a debt is, suspended or postponed until after the war. On this point there has been much discussion. We regard it as immaterial whether it is called by one name or another. In terms it requires certain acts to be done annually or oftener. On each act future rights and obligations depend. It neither begins nor ends, but continues a contract, and one which contemplates future acts of performance by both parties. As a rule each act requires intercourse or communication between enemies, whenever the parties to it are citizens of belligerent States. War therefore dissolves the contract so far as it relates to insurance which depends upon the payment of the premiums after the commencement of the war.

The theory that the premium as it becomes due is a *debt* is a fallacious one, and leads to erroneous conclusions. It resembles a debt only in that it is a payment of money. A debtor is under obligation to pay; here no obligation exists. The payment of a debt may be compelled; payment of the premium is entirely optional with him who is to pay. The intent accompanying the act, the object aimed at, and the consequences resulting therefrom, are essentially and radically different in the two cases. The one discharges an obligation previously existing, and closes the transaction between the parties; the other creates an obligation which did not previously exist, continues in force an existing contract which otherwise would have terminated, and contemplates future dealings between the parties. While it is in form the payment of money, it is in substance the making of a contract. The payment of a debt is only suspended; the making of a contract is prohibited by the war.

Is the contract executed or executory? Is the payment of the annual premiums a condition precedent or subsequent? On these points there has been little discussion. Courts have assumed one answer or the other, in reply to each, according as their decision has been for or against the company. Perhaps a categorical answer either way would not be strictly correct. In the case before us the premium was paid to January 14th, 1862. Up to that time it was an executed contract. No further act was required by either party. Had death intervened, the contract for future insurance would have ceased to exist, and nothing would have remained but to prove the death and pay the money — acts which pertain

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to the remedy. To that extent the contract was not dissolved by the war. By entering into the contract and paying the first premium the party acquired a right to continue the insurance during life. In that respect also it was an executed contract, and the party received all he contracted for — a mere right or privilege, which was unavailable, and without value, unless he complied with the conditions. The law prohibited him from complying, and therefore destroyed the right, precisely as it forbids the contract of partnership or affreightment, and thereby destroys the rights of the parties under it.

In relation to insurance after January 14th, 1862, which is the point that concerns the case, it is different. There is a manifest distinction between a *right to insure* and *actual insurance*. There was no actual insurance, and the party could obtain none, except by complying with the conditions — an act to be done by him. It was an executory contract on his part, and the law preventing the execution of it by him, the contract was necessarily dissolved.

As to the nature of the condition. It has no reference to present insurance; that is unconditional. The right to future insurance is an existing right, which may be defeated by non-payment of the premium. As to that, it is clearly a condition subsequent. But the right is of such a nature that its existence absolutely depends upon payment. Future insurance is not an existing fact, and cannot exist except upon the payment of the premium. As to that it is as clearly a condition precedent. The war, preventing its performance, dissolved that part of the contract. There are cases on this subject in which the courts have come to the same result that we have; but we have not deemed it necessary to notice them at length. *Tait v. New York Mutual Life Ins. Co.*, U. S. Dist. Court of Tennessee, by EMMONS, J., 4 Big. L. & A. Ins. Cos. 479; *Dillard v. Manhattan Life Insurance Co.*, 44 Ga. 119; S. C., 9 Am. Rep. 167. We are aware that the Court of Appeals in New York has taken a different view of the question. *Cohen v. New York Mutual Life Insurance Company*, 50 N. Y. 610; S. C., 10 Am. Rep. 522; *Sands v. New York Mutual Life Insurance Company*, 50 N. Y. 626; S. C., 10 Am. Rep. 535; *Martine v. International Life Insurance Company*, 53 N. Y. 339; S. C., 13 Am. Rep. 529. They rely, however, to a considerable extent, upon the authority of the cases we have been considering. Not being satisfied with the reasons given in those cases, we have not regarded them as binding upon us, but have felt at liberty to consider the case upon principle, especially as we have been informed that the question has been before the Supreme Court of the United States, and no decision rendered, as the court was equally divided.

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We advise the Superior Court that the demurrer should be sustained.

In this opinion PARK, C. J., and PARDEE, J., concurred ; FOSTER and PHELPS, JJ., dissented.

NOTE.—In addition to the cases cited above, see *The Mutual Benefit Life Ins. Co. v. Hillyard*, 18 Am. Rep. 741 ; *Mutual Benefit Life Ins. Co. v. Atwood*, id. 652; both holding a doctrine contrary to the above case.

The question was decided by the Supreme Court of the United States at its October Term, 1876, but the court was divided and even the majority was not harmonious as to the ground of the decision. As the question may still be considered an open one we give here the decision of the Supreme Court. We will only observe that while the cases which have heretofore held that a failure to pay the premiums was not excused by reason of war, put their decision on the ground that the condition to pay was a condition *precedent*, the Supreme Court held that the condition was a condition *subsequent*.

The decision of the Supreme Court was in three cases in error from the Circuit Court of the United States for the Southern District of Mississippi, the first of which was *The New York Life Ins. Co. v. Statham*.

Mr. Justice BRADLEY delivered the opinion of the court. The first of these cases is a bill in equity filed to recover the amount of a policy of life assurance, granted by the defendants (now plaintiffs in error) in 1851, on the life of Dr. A. D. Statham, of Mississippi, from the proceeds of certain funds belonging to the defendants attached in the hands of their agent at Jackson, in that State. It appears from the statements of the bill that the annual premiums accruing on the policy were all regularly paid until the breaking out of the late civil war; but that, in consequence of that event, the premium due on the 8th of December, 1861, was not paid; the parties assured being residents of Mississippi, and the defendants a corporation of New York. Dr. Statham died in July, 1862.

The second case is an action at law brought in the same court against the same defendants to recover the amount of a policy issued in 1859 on the life of one Henry S. Seyms, the husband of the plaintiff. In this case also the premiums had been paid until the breaking out of the war, when by reason thereof they ceased to be paid, the plaintiff and her husband being residents of Mississippi. Seyms died in May, 1862.

The third case is a similar action at law brought in the same court against the Manhattan Life Insurance Company of New York to recover the amount of a policy issued by them in 1858 on the life of C. L. Buck, of Vicksburg, Mississippi; the circumstances being substantially the same as in the other cases.

The policies in all the cases were in the usual form of such instruments, declaring that the company, in consideration of a certain specified sum to them in hand paid by the assured, and of an annual premium of the same amount to be paid on the same day and month in every year during the continuance of the policy, did assure the life of the party named, in a specified amount, for the term of his natural life. The policies contained various conditions upon the breach of which they were to be null and void : and amongst others the following: "that in case the said (assured) shall not pay the said premium on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or in any part thereof, and this policy shall cease and determine." The Manhattan policy contained the additional provision, that in every case where the policy should cease or become null and void, all previous payments made thereon should be forfeited to the company.

The non-payment of the premiums in arrear was set up in bar of the actions, and the plaintiffs respectively relied on the existence of the war as an excuse, offering to deduct the premiums in arrear from the amounts of the policies.

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We agree with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year — as in fire-policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten, or twenty annual installments. Such installments are clearly not intended as the consideration for the respective years in which they are paid; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each installment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong, and healthy, is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance.

But whilst this is true, it must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for out of the co-existence of many risks arises the law of average which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company. This has always been the understanding and the practice in this department of business. Some companies, it is true, accord a grace of thirty days, or other fixed period, within which the premium in arrear may be paid on certain conditions of continued good health, etc. But this is a matter of stipulation, or of discretion on the part of the particular company. When no stipulation exists it is the general understanding that time is material, and that the forfeiture is absolute if the premium be not paid. The extraordinary and even desperate efforts sometimes made, when an insured person is *in extremis* to meet a premium coming due, demonstrates the common view of this matter.

The case therefore is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as in the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence.

But the court below bases its decision on the assumption that when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war, and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts. But have they ever been known

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to take place in the case of executory contracts in which time is material? If a Texas merchant had contracted to furnish some northern explorer a thousand cans of preserved meat by a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war five years afterward and after the return of the expedition? If the proprietor of a Tennessee quarry had agreed in 1860 to furnish during the two following years ten thousand cubic feet of marble for the construction of a building in Cincinnati, could he have claimed to perform the contract in 1865, on the ground that the war prevented an earlier performance?

The truth is, that the doctrine of the revival of contracts, suspended during the war, is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive.

In the case of life insurance, besides the materiality of time in the performance of the contract, another strong reason exists why the policy should not be revived. The parties do not stand on equal ground in reference to such a revival. It would operate most unjustly against the company. The business of insurance is founded on the law of averages; that of life insurance eminently so. The average rate of mortality is the basis on which it rests. By spreading their risks over a large number of cases, the companies calculate on this average with reasonable certainty and safety. Any thing that interferes with it deranges the security of the business. If every policy lapsed by reason of the war should be revived, and all the back premiums should be paid, the companies would have the benefit of this average amount of risk. But the good risks are never heard from; only the bad are sought to be revived — where the person insured is either dead or dying. Those in health can get new policies cheaper than to pay arrearages on the old. To enforce a revival of the bad cases, whilst the company necessarily loses the cases which are desirable, would be manifestly unjust. An insured person, as before stated, does not stand isolated and alone. His case is connected with and co-related to the cases of all others insured by the same company. The nature of the business as a whole must be looked at to understand the general equities of the parties.

We are of opinion, therefore, that an action cannot be maintained for the amount assured on a policy of life insurance forfeited (like those in question) by non-payment of the premium, even though the payment was prevented by the existence of the war.

The question then arises, must the insured lose all the money which has been paid for premiums on their respective policies? If they must, they will sustain an equal injustice to that which the companies would sustain by reviving the policies. At the very first blush it seems manifest that justice requires that they should have some compensation or return for the money already paid, otherwise the companies would be the gainers from their loss; and that from a cause for which neither party is to blame. The case may be illustrated thus. Suppose an inhabitant of Georgia had bargained for a house situated in a northern city, to be paid for by installments, and no title to be made until all the installments were paid: with a condition that on the failure to pay any of the installments when due, the contract should be at an end and the previous payments forfeited; and suppose that this condition was declared by the parties to be absolute and the time of payment material. Now if some of the installments were paid before the war, and others accruing during the war were not paid, the contract, as an executory one, was at an end. If the necessities of the vendor obliged him to avail himself of the condition and to re-sell the property to another party, would it be just for him to retain the money he had received? Perhaps it might be just if the failure to pay had been voluntary, or could, by possibility, have been avoided. But it was caused by an event beyond the control of either party — an event which made it unlawful to pay. In such case, whilst it would be unjust, after the war, to enforce the contract as an executory one against the vendor, contrary to his will, it would be equally unjust in him, treating it as ended, to insist upon the forfeiture of the money already paid on it. An equitable right to some compensation or return for previous payments would clearly

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result from the circumstances of the case. The money paid by the purchaser, subject to the value of any possession which he may have enjoyed, should *ex æquo et bono* be returned to him. This would clearly be demanded by justice and right.

And so, in the present case, whilst the insurance company has a right to insist on the materiality of time in the condition of payment of premiums, and to hold the contract ended by reason of non-payment, they cannot with any fairness insist upon the condition as it regards the forfeiture of the premiums already paid. That would be clearly unjust and inequitable. The insured has an equitable right to have this amount restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence. In other words, he is fairly entitled to have the equitable value of his policy.

As before suggested, the annual premiums are not the consideration of assurance for the year in which they are severally paid, for they are equal in amount; whereas, the risk in the early years of life is much less than in the later. It is common knowledge that the annual premiums are increased with the age of the person applying for insurance. According to approved tables, a person becoming insured at twenty-five is charged about twenty dollars annual premium on a policy of \$1,000; whilst a person at forty-five is charged about thirty-eight dollars. It is evident, therefore, that when the younger person arrives at forty-five, his policy has become (by reason of his previous payments) of considerable value. Instead of having to pay, for the balance of his life, thirty-eight dollars per annum, as he would if he took out a new policy on which nothing had been paid, he has only to pay twenty dollars. The difference (eighteen dollars per annum during his life) is called the equitable value of his policy. The present value of the assurance on his life exceeds by this amount what he has yet to pay. Indeed, the company, if well managed, has laid aside and invested a reserve fund equal to this equitable value, to be appropriated to the payment of his policy when it falls due. This reserve fund has grown out of the premiums already paid. It belongs, in one sense, to the insured who has paid them, somewhat as a deposit in a savings bank is said to belong to the person who made the deposit. Indeed, some life-insurance companies have a standing regulation by which they agree to pay to any person insured the equitable value of his policy whenever he wishes it. In other words, it is due on demand. But whether thus demandable or not, the policy has a real value corresponding to it,—a value on which the holder often realizes money by borrowing. The careful capitalist does not fail to see that the present value of the amount assured exceeds the present value of the annuity or annual premium yet to be paid by the assured party. The present value of the amount assured is exactly represented by the annuity which would have to be paid on a new policy; or, thirty-eight dollars per annum in the case supposed, where the party is forty-five years old; whilst the present value of the premiums yet to be paid on a policy taken by the same person at twenty-five is but little more than half that amount. To forfeit this excess, which fairly belongs to the assured, and is fairly due from the company, and which the latter actually has in its coffers, and to do this for a cause beyond individual control, would be rank injustice. It would be taking away from the assured that which had already become substantially his property. It would be contrary to the maxim, that no one should be made rich by making another poor.

We are of opinion, therefore, first, that as the companies elected to insist upon the condition in these cases, the policies in question must be regarded as extinguished by the non-payment of the premiums, though caused by the existence of the war, and that an action will not lie for the amount insured thereon.

Secondly, that such failure being caused by a public war, without the fault of the assured, they are entitled *ex æquo et bono* to recover the equitable value of the policies with interest from the close of the war.

It results from these conclusions that the several judgments and decrees in the cases before us, being in favor of the plaintiffs for the whole sum assured, must be reversed,

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and the records remanded for further proceedings. We perceive that the declarations in the actions at law contain no common or other counts applicable to the kind of relief which, according to our decision, the plaintiffs are entitled to demand: but as the question is one of first impression, in which the parties were necessarily somewhat in the dark with regard to their precise rights and remedies, we think it fair and just that they should be allowed to amend their pleadings. In the equitable suit perhaps the prayer for alternative relief might be sufficient to sustain a proper decree; but nevertheless the complainants should be allowed to amend their bill if they shall be so advised.

In estimating the equitable value of a policy no deduction should be made from the precise amount which the calculations give, as is sometimes done where policies are voluntarily surrendered, for the purpose of discouraging such surrenders; and the value should be taken as of the day when the first default occurred in the payment of the premium by which the policy became forfeited. In each case the rates of mortality and interest used in the tables of the company will form the basis of the calculation.

The decree in the equity suit, and the judgment in the actions at law are reversed, and the causes respectively remanded to be proceeded in according to law and the directions of this opinion.

WAITE, Ch. J. I agree with the majority of the court in the opinion that the decree and judgments in these cases should be reversed, and that the failure to pay the annual premiums as they matured put an end to the policies, notwithstanding the default was occasioned by the war, but I do not think that a default, even under such circumstances, raises an implied promise by the company to pay the assured what his policy was equitably worth at the time. I, therefore, dissent from that part of the judgment just announced which remands the causes for trial upon such a promise.

STRONG, J. While I concur in a reversal of these judgments and the decree, I dissent entirely from the opinion filed by a majority of the court. I cannot construe the policies as the majority have construed them. A policy of life insurance is a peculiar contract. Its obligations are unilateral. It contains no undertaking of the assured to pay premiums. It merely gives him an option to pay or not, and thus to continue the obligation of the insurers or terminate it at his pleasure. It follows that the consideration for the assumption of the insurers can in no sense be considered an annuity consisting of the annual premiums. In my opinion the true meaning of the contract is that the applicant for insurance, by paying the first premium, obtains an insurance for one year, together with a right to have the insurance continued from year to year during his life, upon payment of the same annual premium, if paid in advance. Whether he will avail himself of the refusal of the insurers, or not, is optional with him. The payment *ad diem* of the second or any subsequent premium is, therefore, a condition precedent to continued liability of the insurers. The assured may perform it or not at his option. In such a case the doctrine that accident, inevitable necessity, or the act of God may excuse performance has no existence. It is for this reason that I think the policies upon which these suits were brought were not in force after the assured ceased to pay premiums. And so, though for other reasons, the majority of the court holds, but they hold at the same time that the assured in each case is entitled to recover the surrender, or what they call the equitable value, of the policy. This is incomprehensible to me. I think it has never before been decided that the surrender value of a policy can be recovered by an assured unless there has been an agreement between the parties for a surrender, and certainly it has not before been decided that a supervening state of war makes a contract between private parties, or raises an implication of one.

Mr. Justice CLIFFORD dissenting. Where the parties to an executory money contract live in different countries and the governments of those countries become involved in public war with each other, the contract between such parties is suspended

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during the existence of the war and revives when peace ensues; and that rule, in my judgment, is as applicable to the contract of life insurance as to any other executory contract. Consequently I am obliged to dissent from the opinion and judgment of the court in these cases.

Mr Justice HUNT concurs in this dissent.

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(41 Conn. 421.)

Bank — unauthorized payment of check to agent of payee.

Plaintiffs, having received the check of a third party payable to their order, indorsed it to the order of the cashier of defendants' bank and, inclosing it in an envelope, sent it to the bank for deposit by a messenger whom they knew to be untrustworthy. The messenger removed the check from the envelope and presented it to the bank for payment, stating that plaintiffs desired the money. The bank gave to the messenger the amount of the check and he absconded with it. The payment was not in the usual course of business. *Held*, that plaintiffs could recover of the defendants the amount of the check.

ASSUMPSIT for money had and received.
The court found substantially the following facts: The plaintiffs, a manufacturing corporation, received from a customer a check as follows:

“NEW YORK, *July* 16, 1872.

“THE SECURITY BANK.

“Pay to the order of Theo. Myers One Thousand and thirty-nine $\frac{77}{100}$ dollars. J. A. HOPPER.”

“\$1039 $\frac{77}{100}$.”

Indorsed. “Pay to order of Bristol Knife Co. THEO. MYERS.”

The treasurer of the plaintiff's company indorsed the check as follows: “Pay to order of Cashier First National Bank. BRISTOL KNIFE Co., per W. R.”

The treasurer inclosed it, with a deposit slip, in an envelope, and gave it to his brother, who he knew was untrustworthy, and requested him to deposit the check to the credit of the company, in defendants' bank, where the company did business. The brother removed the check from the envelope and presented it for payment, saying that the company de-

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sired the money to pay its hands. The teller, after consultation with the cashier, paid the amount of the check, and the brother absconded with the money.

The plaintiffs had, at other times, procured money from the bank upon their own checks and once upon a note discounted, but in no instance upon the check of a third person nor through the same messenger.

The court also found that the transaction was not in the usual course of business.

The court rendered judgment in favor of the plaintiffs, and the defendants moved for a new trial.

Robinson, in support of the motion, cited *Chitty on Bills*, 231; *Lee v. Chillicothe Branch Bank*, 1 Bond, 387; *Trimbey v. Vignier*, 1 Bing. N. C. 151; 1 *Parsons on Notes and Bills*, 257; *Roberts v. Hall*, 37 Conn. 212; S. C., 9 Am. Rep. 308; *Young v. Grote*, 4 Bing. 253; *Tucker v. Woolsey*, 64 Barb. 144; *Brush v. Scribner*, 11 Conn. 392; *Hoyt v. Seeley*, 18 id. 358; *Goodman v. Simonds*, 20 How. 343, 366; *Murray v. Lardner*, 2 Wall. 110, 121; *Wilson v. Holmes*, 5 Mass. 543; *Fisher v. Pomfret*, Carthew, 403.

Perkins, with whom was *Newell, contra*, cited 1 *Parsons on Notes and Bills*, 277; 2 id. 279; *Chitty on Bills*, 227, 255; *Roberts v. Tucker*, 16 Adol. & El. (N. S.) 578; *Clark v. Whitaker*, 50 N. H. 474; *Roberts v. Hall*, 37 Conn. 212; S. C., 9 Am. Rep. 308; *Belknap v. Bank of N. America*, 100 Mass. 381; *Bank of N. America v. Bangs*, 106 id. 445; S. C., 8 Am. Rep. 349; *Doubleday v. Kress*, 50 N. Y. 410; S. C., 10 Am. Rep. 502.

LOOMIS, J. The principles that control this case are not to be found in any distinction between special and restrictive indorsements of negotiable paper, nor in any view of the rights of *bona fide* holders or purchasers of such paper.

The record shows that the defendants put no faith in any title which the holder of the check had or assumed to have; hence their position is not like that of a *bona fide* purchaser of negotiable paper, from a holder clothed with the apparent legal title.

The holder in this case not only made no pretense of title, but openly professed to act only in behalf of the plaintiffs.

The defendants well knew that the check was the property of the plaintiffs, that the transaction was wholly with them, and that they must account to them for the avails. It is found that the defendants have

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collected the full amount of the check ; but have they ever accounted to the plaintiff for the same ?

It is conceded that they paid the amount of the check to the messenger who brought it to the bank, and the question is, whether such payment, in legal effect, is a payment to the plaintiffs ?

The whole case resolves itself into a mere question of agency. Had the messenger who delivered the check at the bank authority from the plaintiffs to receive the money thereon ? It is conceded that there was no authority in fact. The only authority of the messenger, in fact, was to deliver to the bank the sealed envelope containing the check and deposit ticket, have the check credited to the plaintiffs, and get the bank book. He was not in any sense a general agent, he had never done any business for the plaintiffs of any kind, and was an entire stranger to the officers of the bank.

He was only a special agent, and that, too, of exceedingly limited authority. And here the familiar and elementary rule of law applies, " that an agent constituted for a particular purpose, and under a limited power, cannot bind his principal if he exceeds that power. Whoever deals with an agent constituted for a special purpose, deals at his peril when the agent passes the precise limits of his power."

We would not, however, adhere so closely to the literal terms of this rule as to do injustice to innocent third parties, who have acted on the confidence of an apparent authority for which the principal is justly responsible. But in order to bind the principal he must, by his words or acts, have fully authorized the third party to believe that the agent had authority, and in applying this rule to business transactions care must be used to distinguish clearly between the act of the principal and the mere act of the agent. If the agent by his act assumes an appearance of authority which induces a third party to believe he has, in fact, authority, it is not sufficient. It is the principal's own act only that gives to the agent an appearance of authority which becomes binding on him.

If, then, we look at the act of the plaintiffs, without reference to what the messenger wrongfully assumed, we find that all the plaintiffs did was to indorse the check payable to the order of the cashier, and put it, together with a deposit ticket, in a sealed envelope, and hand it to the messenger to carry to the bank. These acts of the plaintiffs do not, it seems to us, imply any authority in the messenger to collect the money on the check.

If the sealed envelope, containing the check and deposit ticket, had been presented to the bank in the same shape as delivered to the messenger, it would have been clear that only a deposit was intended.

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It may be suggested that the presentation by the messenger of the naked check at the bank ought to be considered as authorized by the principal for the purpose of fixing the liability.

We do not so regard it. Suppose the envelope had inclosed a written request, relative to the matter, intended for presentation to the cashier, and the messenger had broken the seal and destroyed the writing, and had presented the check by itself, would we judge the principal in such case simply by the fact that the special agent was authorized to present the check? If so there would be no safety in employing a messenger to do the simplest errand.

But, if we concede, for the sake of argument, that the authority given to the messenger was to present the check by itself to the bank, we do not think an authority to receive the money can fairly be implied under the circumstances of this case.

The circumstances here do not enlarge the apparent scope of the agent's authority, but greatly contract it.

The form of indorsement, "Pay to the order of the cashier," was unnatural, if the plaintiffs intended to have the bank pay the money to the messenger. The object of this special indorsement was, undoubtedly, to prevent the bank from paying the check to any one except the plaintiffs, and everybody except the bank itself would be precluded from collecting it in that form; and, under such circumstances, we think the presentation of this check at the bank, by a perfect stranger, who called for the currency on it, ought to have aroused suspicion.

It would seem impossible, when the currency was called for, to suppress doubts and inquiries, like the following: Why did not the plaintiffs indorse the check payable to bearer, or to the order of the messenger? or, why did they not send a check to draw the amount? or why did they not send an accompanying letter of explanation?

And suppose there had been an indorsement by the plaintiffs, to pay this check to the bearer, or to this messenger by name. In such case, though it would have been legally safe to have paid the money to this messenger, yet, would not common prudence require the officers of the bank to request that some person known to the bank should identify the bearer, who was a perfect stranger to them?

In this case, though the bank was trusting a stranger at their own peril, yet they required no evidence of his authority, except the possession of the check, and his verbal statement, corroborated in the opinion of the cashier by some personal and family resemblance which he bore to the treasurer of the plaintiffs.

Again, it is found by the court that the payment of the money on a

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check indorsed like this was not the ordinary way of using such checks as between banks and persons having deposit accounts with them, but that the regular course was for the banks to credit the checks to the account of the other party, who obtained the avails by drawing their own checks on the bank.

And it is further found that such was the uniform practice and course of dealing between the parties to this suit, prior to the transaction in question.

Under all the circumstances to which we have adverted, it seems clear that the natural presumption arising from the presentation of this check, specially indorsed payable to the order of the cashier, was, that it was intended for a deposit; and so it seemed to strike the mind of the teller at the time, and it was only when the cashier put faith in the mere story and appearance of the messenger that this presumption yielded, and the defendants were deceived to their injury; but in so doing they were dealing with a special agent, at their peril, who was no longer pursuing the authority of his principal, either in fact, or as exhibited to the public.

A new trial is not advised.

In this opinion PARK, C. J., and CARPENTER, J., concurred.

PHELPS, J. I am unable to concur. The plaintiffs were the primary, if not the sole, cause of the fraud which was committed. If they had forwarded the check by express, or mail, the appropriate and usual modes of transmitting funds to a depository, or had delivered it personally, or intrusted it to a sober and honest messenger, as they were bound to have done if they employed any, no one would have been injured. The facts, though stronger, are in principle precisely analogous to those which controlled the judgment in *Young v. Grote*, 4 Bingham, 253.

The managing agent and proper officer of the plaintiffs indorsed the check in full so as legally to vest the title in the defendants on delivery, and so indorsed, confided it to his brother, who was known by him "to be addicted to excessive drinking," with *verbal* directions to deliver it to the defendants for a particular purpose, and thus enabled him to appear to the defendants as having a lawful right to deliver it for any legitimate purpose for which the defendants might receive it. The plaintiffs thereby placed him in a position, and put it in his power, to perpetrate a fraud. He was dishonest as well as intemperate, and the defendants in the exercise of reasonable prudence and diligence trusted to his representation respecting the purpose of the delivery of the check and were deceived "The principles of equity as well as of commercial law require that he

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who has thus put it in the power of another to defraud should himself sustain the loss, rather than the person who has given credit to those appearances." *Brush v. Scribner*, 11 Conn. 392; *Hoyt v. Seeley*, 18 id. 558; Story on Agency, §§ 127, 139. "When one of two innocent persons must suffer, it is more reasonable that he should suffer whose act of employing an unskillful or negligent servant was the cause of the injury, than that the other who had been wholly in the right should be compelled to bear a loss brought upon him through another's want of care in not attending to his own business and in trusting it to the carelessness of his servant." *Thames Steamboat Co. v. Housatonic R. R. Co.*, 24 Conn. 54. It is more reasonable that a party employing an agent should be responsible for his misconduct, than that an innocent party who confided in him should suffer. *Willard v. Buckingham*, 36 Conn. 402.

That the defendants acted in good faith is conceded. It is said, however, that the plaintiff had never previously received currency from the defendants in this way, and that it was contrary to the common practice of the defendants to pay it out on checks of this description. Undoubtedly this fact imposed on the defendants the exercise of greater diligence and caution than if the fact had been otherwise. But what more than the defendants did could they have been reasonably required to do? Their diligence was substantially and correctly answered with respect to every thing except the integrity of the plaintiff's messenger. His representation that he was the brother of William Reynolds, who was the principal manager of the business of the plaintiff, was true, his identity was established, and the plaintiff's indorsement of the check genuine. How were the defendants to discover his dishonest motive in demanding currency for the check and appropriating it to his own use? They knew nothing of him, his character or habits. It surely cannot be said that reasonable diligence required of them, before paying the check, to write or telegraph to Reynolds the inquiry whether his brother to whom he had intrusted the check was honest and trustworthy, and under the circumstances I think they may have properly considered and treated the messenger as sufficiently accredited by the plaintiffs. Otherwise a serious obstacle to the free use of such paper, and a like unusual and unexpected embarrassment to bankers in the transaction of their business, will be found to exist. I would do nothing to impair in the slightest degree the proper force of the obligation which rests upon them to exercise reasonable care in such and all similar cases, but think the defendants were not wanting in the diligence which the law required. *Goodman v. Simonds*, 20 How. 343, 366; *Murray v. Lardner*, 2 Wall. 110, 121. If the person pre-

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senting the check had been a stranger to the plaintiffs, and forged the indorsement, and the defendants had paid the check, they could have interposed no sufficient defense against the plaintiffs' claim; and so also if he had stolen the check after indorsement and falsely stated the purpose of the delivery. In those cases the plaintiffs would not have employed or been otherwise identified with him as a principal, or have placed him in a position which enabled him to defraud the defendants, and would have been free from such fault as essentially contributed and directly operated to produce the injurious result. But here was no forgery, or theft, but simply a wrongful conversion, or breach of trust, by the plaintiffs' messenger and agent, and connected with it a false and fraudulent statement of the object of the delivery of a check so indorsed as to pass, and vest in the indorsee, the legal title when the delivery should be thereafter made. I think it cannot properly be maintained that the owner of a check may so indorse and give it currency, and place it for delivery in the hands of such an agent, and make the party who innocently receives and pays it responsible for the fraud and loss. As between the parties, justice is manifestly violated by compelling the defendants to pay it the second time.

The messenger was the special agent of the plaintiffs for the purpose of delivering the check to the defendants as a deposit. But in the absence of any written message to the defendants handed to them in connection with the check and specifying the object of the delivery, the apparent scope of his authority would by necessary implication seem to extend to a verbal statement of the object for which it was to be received by the defendants. How otherwise, aside from the previous course of dealing of the parties, could the defendants have been informed? In that dealing by the defendants there was nothing in the nature of an estoppel, and the most that can be said is that the defendants were bound to the exercise of greater diligence than if such a course of dealing had not existed. The general principle with regard to the effect upon parties of the ordinary course of business in the use of commercial paper as determining the rights of the holder, has no more than a collateral relation to this question. The pertinent inquiry is, did the defendants, in consideration of the particular act done, and in view of the attending circumstances, exercise reasonable caution and diligence? Although unusual, it was perfectly legitimate for the defendants to receive the check and pay its value in currency. It was not irregular or unbusinesslike to do it. The defendants knew the plaintiffs were a manufacturing corporation employing workmen and paying them in currency, and had previously supplied the plaintiffs on their own checks for

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that purpose. The particular mode of performing the act was immaterial, except so far as it tended to characterize, or raise a presumption affecting the propriety of the act itself. No suspicion of bad faith attaches to it, and it was what the defendants might at any time very properly be requested by a customer to do. When the plaintiffs needed currency they might not always have a balance to their credit, and it would be more convenient to forward for its amount in currency the check of a third party in their possession than to deposit that check and draw against the plaintiffs' own check. Either mode is equally lawful and proper, and no unfavorable presumption should attach to a party who adopted either in a particular instance contrary to his usual custom.

While the law requires of a party dealing with a special agent to ascertain the extent of his authority, it establishes the scope of the authority given as the criterion of actual authority ; and the acts done pending and in pursuance of the agency and within its apparent scope, and the declarations made by the agent at the time and explanatory of them, are the acts and declarations of the principal. . *Tucker v. Woolsey*, 64 Barb. 144 ; *Thalhimer v. Brinkerhoff*, 4 Wend. 394 ; S. C., 6 Cow. 99 ; *Hartford Bridge Co. v. Granger*, 4 Conn. 147 ; *Norwich & Worcester R. R. Co. v. Cahill*, 18 id. 485 ; *Willard v. Buckingham*, *supra*.

The declaration of the plaintiffs' agent respecting the use to be made of the check was of that character. It was a verbal act in connection with, and explanatory of, the manual act of delivering the check. It was made *dum fervet opus*, and constituted an essential part of the *res gestæ*. It was done by authority derived by implication from the actual authority given, and was the legal act of the plaintiffs. 1 Greenl. Ev., §§ 113, 114 ; *Perkins v. Burt*, 2 Root, 30 ; *Smith v. Board of Water Commissioners*, 38 Conn. 218.

For the reasons given I think a new trial should be advised.

FOSTER, J., concurred in this opinion.

McKenzie's Appeal.

McKENZIE'S APPEAL.

(41 Conn. 607.)

Will — devise — when devise over void.

A testator gave his widow certain personal estate, and provided that *if any remained at her decease* it should be equally divided among his children. *Held*, that an absolute power of disposal was given to the widow, and that the gift over was inconsistent with this power and therefore void.

A PPEAL from a decree of a Court of Probate appointing trustees of certain property given by the will of William M. McKenzie to the appellant; brought to the Superior Court in New Haven county, and reversed, upon facts found, for the advice of this court. The case is fully stated in the opinion.

W. C. Robinson and Arvine, for appellant.

Wright and G. W. Smith, for appellees.

PARDEE, J. William M. McKenzie died, leaving a will, the second clause of which we are asked to interpret. It is in the following words :

“ I give, bequeath and devise to my wife, Temperance McKenzie, so long as she shall remain my widow, the homestead where we now live; also all the household furniture, farming utensils, live stock, wagons and harness, together with forty-four shares of the Second National Bank stock, of New Haven, and ten shares of the New Haven National Bank stock. The real estate to be held by my wife on condition that she remains my widow during her life, to be hers and her heirs, forever, and disposed of as she shall think proper; and the personal estate, if any remains at her decease, to be divided equally among all my children then living or their legal representatives.”

Thus the testator, after devising his homestead to his widow, bequeaths to her certain personal property; of the latter he says “ *if any remains at her decease*, to be divided equally among all my children then living or their legal representatives.”

The appellees insist that these are apt words for the creation of a trust, as to the personal property named, in favor of the heirs. But we think that they carry an absolute gift to the widow; and this, considering both the legal effect which judicial decisions have given them, and the intention of the testator in using them.

In *Attorney-General v. Hall*, Fitzg. 114, the testator devised real and

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personal estate to his son and the heirs of his body living, and then devised so much of his real and personal estate *as his son should be possessed of at his death* to the Goldsmith's Company of London in trust. The son entered, on his father's death, barred the entail of the real estate by a common recovery, and died leaving no issue living at his death. It was determined that this limitation was void, as the first devisee had a power to spend the whole, which was an absolute gift.

In *Jackson v. Bull*, 19 Johns. 20, the language of the testator was "in case my said son Moses should die without lawful issue, *the property he dies possessed of* I will," etc. The words were held to imply a power of alienation by the devisee, and consequently an absolute ownership repugnant to the limitation and destructive of it.

In *Ramsdell v. Ramsdell*, 21 Me. 288, the court held that the intention to authorize a legatee to dispose of property absolutely and without limitation, was clearly implied by the words "*if any remains*," in the devise over.

In *Harris v. Knapp*, 21 Pick. 416, it is said that by the words "*whatever shall remain*," the implication is inevitable that the legatee had power to make such a disposition; and that this is inconsistent with the supposition that the whole was to remain undiminished in the hands of the executor or other trustee for the purpose of satisfying the gift over.

Chancellor KENT, in 4 Com. 270, says that if estate be divided to A in fee, and if he *dies possessed of the property* without lawful issue, the remainder over; or remainder over of the property which he, dying without heirs, should leave; in all such cases the remainder over is void by way of executory devise, because the limitation is inconsistent with the absolute estate or power of disposition expressly given or *necessarily implied by the will*. A valid executory devise cannot subsist under an absolute power of disposition in the first taker.

WILDE, J., in *Homer v. Shelton*, 2 Metc. 202, uses this language concerning a limitation over: "On the contrary, the limitation extends to the plaintiff's whole share of the property devised and bequeathed to him, and not to *such part thereof as he might leave undisposed of at his decease*, from which a power of disposal might be implied."

In Perkins' edition of Jarman on Wills, vol. 1, page 677, note 2, it is said that "whenever it is clearly the intention of the testator that the devisee shall have an absolute property in the estate devised, a limitation over must be void, because it is inconsistent with the absolute property supposed in the first devisee; and a right in the first devisee to dispose of the estate devised at his pleasure, and not a mere power of specifying

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who may take, amounts to an unqualified gift." *Lynde v. Easterbrook*, 7 Allen, 68; *Fisk v. Cobb*, 6 Gray, 144.

We also think that the expression, "if any remains," shows that it was the testator's intention to give the widow the specific property with the right to use it for the benefit of herself and her children; the right to consume it in the use, if her judgment should dictate, or her necessities compel that course; in short, the right of absolute and unlimited disposal without control or restriction; and that the legal meaning of the language used sanctions the carrying out of that intent. Having the power to make it certain that the principal of the bank-stock, at least, should remain, he refrains from exercising that power, and clearly recognizes the probability that she would in her life-time exercise her right to dispose even of that.

In considering, as we must, the whole paragraph in our effort to comprehend the intent, we refer the language respecting the disposition of that part of the specific property which might be in existence after the happening of a certain event, either to a belief which the testator may have entertained as to his power to deal thus with property which he has made the subject of an absolute gift, or to a desire to put upon record his emphatic advice as to the ultimate destination of it.

Finding, as we do, the legal effect of the language and the intent of the testator coinciding in giving to the widow absolute power of disposal, we advise the Supreme Court that the widow takes an absolute estate in the personal property under the will, and that the orders of the Probate Court complained of should be disaffirmed.

In this opinion the other judges concurred.

MURRAY V. JENNINGS.

(42 Conn. 9.)

Damages for fraud in exchanging property.

Plaintiff gave defendant a yoke of oxen for a horse which defendant fraudulently represented to be sound. The horse was really worth more than the oxen, but had he been as represented would have been worth much more. *Held*, in an action for the fraud, that plaintiff was entitled to recover the difference between the actual value of the horse and its value if sound, and that the question was not affected by the fact that the actual value was greater than that of the oxen.

TRESPASS on the case for fraud. The court found the following facts:

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On the 15th of March, 1874, the plaintiff owned the pair of oxen in the declaration mentioned, which she had bought five years before for \$190, and which she valued at \$200, which were worth, as beef cattle, only \$100. At the same time the defendant owned the horse in the declaration mentioned, and on that day proposed to the plaintiff that she should exchange the oxen for the horse, she having a few days before offered to sell him the oxen for \$200. He was unwilling to pay this sum in cash for the oxen, but proposed to exchange his horse for them without paying or receiving any difference. In answer to her inquiries he then assured her that the horse was perfectly sound in every respect, so far as he knew, except a small bunch on one of the fore-legs, which the plaintiff saw. The horse was not at that time sound with that exception, but was and for many years had been foundered and unsound, and liable at any time to become very lame and unfit for use; which unsoundness was well known to the defendant.

The defendant made the representations to her fraudulently and for the purpose of inducing her to part with the oxen in exchange for the horse, and the plaintiff, relying upon the representations and believing them to be true, did then barter the oxen to the defendant and take in exchange for them the horse and no other consideration whatever, and she would not have made the exchange unless she had believed, from the representations so made to her by the defendant, that the horse was perfectly sound, with the exception of the small bunch on its leg before-mentioned.

The bunch was no considerable detriment to the horse, and injured it in no way except slightly in appearance, and if the horse had been sound with that exception, as represented by the defendant, it would have been worth at the time of the exchange, \$225, but on account of such other unsoundness it was actually worth at the time only \$125. There was no fraud of any kind on the part of the plaintiff in the transaction. The oxen were immediately after butchered by the defendant. The plaintiff did not return the horse to the defendant on discovering the unsoundness, but it is now in her possession.

Upon the foregoing facts the defendant claimed, as matter of law, that the plaintiff was not entitled to recover, inasmuch as the oxen, which were procured by the defendant for beef, were really not worth to him so much as the horse was really worth to the plaintiff, and that therefore there was no damage to the plaintiff; but the court decided against this claim, and held that the measure of damages should be the difference between the actual value of the horse at the time of the exchange and what the horse would have been worth at that time if it had been sound

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as represented by the defendant; and therefore rendered judgment for the plaintiff to recover \$100 and costs.

The defendant moved for a new trial for error in this ruling of the court.

Thompson, in support of the motion.

Sturges, contra.

PHELPS, J. The plaintiff owned a pair of oxen, and the defendant a horse, which they exchanged. The horse was unsound, and known to be so by the defendant, who fraudulently represented it to be otherwise. The oxen were worth \$100, and the horse with its unsoundness \$125, and if sound, as represented by the defendant, would have been worth \$225. The plaintiff, with no fraud or fault on her part, relied on the truth of the statement made to her by the defendant, and without that would not have made the exchange. The Court of Common Pleas rendered judgment for the plaintiff for the difference between the actual value of the horse and what it would have been worth if in the condition represented by the defendant, and the defendant moves for a new trial for the alleged reason that the plaintiff had suffered no injury by the exchange of property with the defendant, and therefore was entitled to no damage.

We concede to the defendant the established principle that the plaintiff must have sustained some injury, and that both fraud and damage must have concurred, to establish legal liability. In one sense the plaintiff would seem to have suffered no damage, but the law gives her the benefit of the contract, and places her with respect to it and to all her rights under it in the same position as if no fraud had been practiced upon her, and as if the horse was as sound and valuable as she had a right from the defendant's representations to her to believe it was. In that view of the case she was injured to the extent for which the judgment was given. We are satisfied the court below adopted the correct rule, and a new trial is not advised.

In this opinion the other judges concurred.

Continental Life Insurance Company v. Palmer.

CONTINENTAL LIFE INSURANCE COMPANY V. PALMER.

(42 Conn. 60.)

Life insurance — payees named in policy take a heritable interest.

A wife procured a policy of insurance upon the life of her husband, payable to her if living, if not, to her children. Both she and one of the children died before the husband. *Held*, that a transmissible interest vested in the children upon the issuing of the policy, and that the heirs of the deceased child took by descent its interest and were entitled to a portion of the amount assured.

BILL of interpleader brought against certain parties claiming interest in the amount of a life insurance policy payable by the petitioners. The opinion states the case.

Freeman, for respondent, Charles P. Palmer.

G. Pratt & L. Brown, for other respondents.

CARPENTER, J. Betsy A. Palmer insured the life of her husband, Benjamin W. Palmer, in the sum of three thousand dollars, payable to herself, if living, if not, to their children. She died before her husband. Amos F. Palmer, one of the children, also died during the life of his father, leaving issue, Charles P. Palmer, one of the respondents. The question reserved for our consideration is, whether Charles P. Palmer takes an interest in the policy, or whether the whole sum insured vests in the surviving children.

It will aid us in the solution of this question to consider briefly the nature, object and purpose of this policy. In form it is a contract for the payment of money. In substance it closely resembles estate left by a deceased person. Its purpose is a provision for the benefit of the family after the death of the husband and father. It is in some sense an estate left by the deceased. Had it been payable to his representatives the title to the policy would have vested in him, and its avails would have been technically his estate. Being payable to the wife and children it is brought within the provisions of the statute exempting it from the claims of creditors. But for the statute it would have been a fund in the hands of his representatives for the benefit of creditors, provided the premiums had been paid by him. In such a case the operation of the statute would be in effect to vest a portion of his estate immediately in the widow, or heirs, without the intervention of executors or administrators. This case does not show whether the premiums were

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paid by the husband or the wife ; nor is it material ; the construction of the contract must be the same whether they were paid by the one or the other. Had the premiums been paid by him, and the policy been made payable to his executors or administrators, it would have vested in them as such, and would have been liable for debts, and subject to distribution like any other estate. So too of the excess beyond the amount exempt from the claims of creditors. There is then so near a relationship between the money represented by this policy and the estate of a deceased person, that we think it should be governed by the same general principles.

The statute of distribution furnishes the rule of division in all cases where it is not otherwise provided. Where there is an intention, manifested according to the forms of law, to change the course of descent, the statute must yield. That intention is usually found in wills ; in the case before us it is in a contract authorized by law. Had the wife survived she would have taken, and the property would have been diverted from the channel indicated by the statute. Her prior decease gives it to the children, substantially in harmony with the statute. This instrument, being testamentary in its nature, should be interpreted by the same rules. Therefore, as in wills of doubtful meaning, one construction being in harmony with the statute and the other contrary to it, preference is given to the former, so this contract should receive an interpretation, if possible, which will dispose of the fund according to the law of descent. We think there is no difficulty in so interpreting it. There is a natural presumption that the parties so intended it. When we consider that it was a *mother* who made this contract, and who probably paid the premiums, we cannot possibly presume that she, had her attention been called to it, and had she known that the child of one of her children would become an orphan before the policy became payable, would intentionally deprive such child of all interest in the policy. Had such been her intention it would have been easy to express it in unmistakable terms. Had the policy been payable to her "surviving children," or to those "who should be living" at the death of the insured, it would have removed all doubt.

But supposing, as she doubtless did, that all her children would survive, the policy was made payable to them generally. And now a contingency has arisen which manifestly was not contemplated. If the natural presumption cannot be regarded as a legal presumption, and the law, to meet the contingency, is compelled to interpolate in the contract a provision, either limiting the payment to the surviving children, or including as payee the issue of a deceased child, we think both reason and justice require the latter. It requires no argument to show that it is just. Its

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reasonableness is equally apparent when we consider the nature and object of the estate, and the relation to it of the parties concerned.

There is another view which may be taken of this case, and which will lead us to the same result. The moment this policy was executed and delivered, it became property, and the title to it vested in some one. It will not be claimed that it vested in the person whose life was insured. It must have vested then in *all* or in a *part* of the payees. The payees consist of two parties, the wife, and the children. As only one could take and enjoy the property ultimately, it did not vest in all as tenants in common; nor did it vest in either so as to give a right to the present enjoyment of it. It was not, however, a mere expectancy, nor a naked possibility, but it was a possibility coupled with a present interest. It was visible, tangible property, and, like any other insurance policy, it was capable of assignment, and had an appreciable value. Each party took a conditional, not an absolute, right to the whole policy. It was not a condition precedent, but subsequent. The title vested in point of right immediately, but was liable to be divested upon the happening of a subsequent event. The right to the policy, in a strict sense, was not contingent; the possession and enjoyment of the fund thereby created were postponed to the future, and were contingent. This contingency applied to both parties — to the wife as well as to the children. Her enjoyment of the fund depended upon her surviving her husband; the children's, upon her husband's surviving her. In respect to each, it was a then present right to the future enjoyment of property, but it was liable to be defeated by a subsequent contingency, and was certain to be defeated as to one of them. That such a right is recognized as property, and is transmissible to heirs, is a proposition abundantly established by the authorities.

The question has usually arisen in cases involving the construction of wills. But we cannot perceive that it makes any difference whether the instrument directing the payment of money is a will or a contract. So long as cases are alike in other respects, we apprehend that they will be governed by the same principles.

In *Winslow v. Goodwin*, 7 Metc. 363, this subject is considered, and the doctrine broadly asserted that a contingent interest in real or personal estate is transmissible like vested interests, and the English authorities cited seem to sustain that position. We have no occasion to say that every contingent estate is devisable. Where the contingency is of such a nature that no interest vests until the happening of the event upon which the estate depends, it is difficult to see how any thing can be transmitted to heirs. So too, if the death of a party in whom a contingent

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interest is vested, is an event, by reason of its happening before some other event, upon which the estate is given to others, the heirs take nothing. An illustration of this is found in the present case. The wife dying before her husband her interest in the policy did not descend to her heirs, but died with her, and the interest in the children became absolute.

In *Winslow v. Goodwin* the testator gave an estate real and personal, in trust for the sole and separate use of a married daughter, and at the death of her husband it was to be conveyed to her and her heirs. The will further provided that if she died in the life-time of her husband the trustee should hold it in trust for her children, until they respectively became of age, when it was to be conveyed to them. There were nine children, all of whom were born in the life-time of the testator. The daughter died, her husband surviving her. Two of her children died before she did, and one afterward ; all of whom died without issue. It was held that the deceased children had an interest in both the real and personal estate which was transmitted to their heirs.

That is a strong case, and is an authority for holding that the children in the present case had an interest in the policy from its inception which was transmissible to heirs.

The English cases are equally decisive. Indeed the rule was established there at an early day, and does not appear to have been departed from. *Weale v. Lower*, Pollexfen, 54 ; *Anonymous*, 2 Vent. 347 ; *Pinbury v. Elkin*, 1 P. Wms. 563 ; *Chauncey v. Graydon*, 2 Atk. 616 ; *Hodgson v. Rowson*, 1 Ves. 46 ; *Barnes v. Allen*, 1 Brown's C. C. 181 ; *Jones v. Roe*, 3 Term R. 88. The latter case was decided in 1789. Lord KENTON, Ch. J., at the commencement of his opinion manifests a little impatience that the question should then be discussed as an open one, and closes his opinion by saying, "I sincerely hope that this point will be now understood to be perfectly at rest." In 1810 the doctrine was again recognized. *Perry v. Phelps*, 17 Ves. 173.

In *Fearne on Remainders*, 364, the rule is laid down as follows : "And in general it seems that contingent interests pass to the real or personal representatives, according to the nature of such interests, as well as vested interests, so as to entitle such representatives to them when the contingencies happen. But some cases may arise where the existence of the devisee of the contingent interest, at some particular time, may by implication enter and make part of the contingency itself upon which such interest is to take effect." The rule is thus stated by Chancellor KENT, 4 Com. 261 : "All contingent and executory interests are assignable in equity, and will be enforced, if made for a valuable consideration ;

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and it is settled that all contingent estates of inheritance, as well as springing and executory uses, and possibilities coupled with an interest, where the person to take is certain, are transmissible by descent, and are devisable and assignable." The doctrine as stated by Mr. Redfield (Redfield on Wills, 390) applies directly to the present case. "It seems to be settled beyond all question that all vested estates, even though liable to be defeated by conditions subsequent, are transmissible, and by consequence devisable."

Our own court has applied this doctrine to a life insurance policy like the one in the case at bar, and held that an interest vests in the payee, during the life-time of the person whose life is insured, so as to be the subject of testamentary disposition, notwithstanding such interest is liable to be defeated by a subsequent contingency. *Keller v. Gaylor*, 40 Conn. 343.

In *Conn. Mutual Life Ins. Co. v. Burroughs*, 34 Conn. 305, the policy was like the present one. The life of the husband was insured for the benefit of the wife, and in case of her death, of the children. The wife assigned the policy to a creditor, and died during the life-time of the husband. It was held that the interest of the children was unaffected by the assignment, and that they were entitled to the avails of the policy. See also *Chapin v. Fellowes*, 36 Conn. 132; S. C., 4 Am. Rep. 49.

For these reasons we are of the opinion that Amos F. Palmer at the time of his decease had an interest in this policy which was transmissible by descent; and consequently that the respondent, Charles P. Palmer, is entitled to that portion of the fund which his father would have taken if living.

The Superior Court is advised to render judgment accordingly.

In this opinion the other judges concurred, except PARK, C. J., who dissented.

NEW YORK & NEW HAVEN RAILROAD COMPANY v. THE CITY OF
NEW HAVEN.

(42 Conn. 279.)

Assessments for betterments — property benefited — railroad property.

Assessments for betterments were required by defendants' charter to be made on the property specially benefited. A railroad company was assessed for the paving of a street in front of its passenger station, which paving made access to the station more easy and increased the value of the land for building or other business purposes. Held, that the company was not liable to the assessment as their property was not specially benefited for any purpose for which they could lawfully use it.

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APPPLICATION for relief from assessments made by the defendants for the paving of streets in New Haven, on the ground that the charter of the city required the assessments for street improvements to be made on the property specially benefited, and that the applicant's property was not benefited. The material facts and findings are given in the opinion.

Bronson, for the City of New Haven.

Watrous, for applicants.

CARPENTER, J. In each of these cases the appellant applied to the Superior Court for relief against the assessment of betterments laid by the city of New Haven for the purpose of defraying the expense of paving a public street. The appellants are railroad corporations, engaged only in the business of operating railroads, and the land assessed in each case is used exclusively for railroad purposes.

These assessments can be made only on property which is specially benefited by the improvement. The question then is, whether the land assessed was specially benefited. The language of the finding is: "I do not find that the appellant derived any benefits from said pavement, except such, if any, as are necessarily to be inferred from the foregoing facts." The finding in this respect is the same in both cases.

The material facts thus referred to are, that the land assessed is used exclusively for railroad purposes, the land owned by the New York & New Haven Railroad Company having a passenger station upon it, and the land owned by the Shore Line Railway having no building upon it; that access to the station building is made easier by the improvement, and that the value of the land is increased for building purposes generally.

We are unable to see how the land assessed is made any more valuable to the owners for any purpose for which they can lawfully use it. The land was originally taken, is now used, and presumptively must continue to be used, for railroad purposes. For such purposes it can be no more benefited by the improvement than land taken for water-works, public streets, or parks.

The fact that the pavement makes access to the railroad station easier shows a benefit to the public at large, but not a special benefit to the corporation. They carry no more passengers, and receive no greater compensation, in consequence of such increased facilities.

The increased value of the land for building purposes, or for business purposes generally, will hardly justify the assessment. Whatever benefit

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there is, is remote and contingent; not direct, immediate, and certain. The corporation can only realize the benefit, if ever, at some distant time in the future, when the present use is no longer required; and it is wholly uncertain whether that time will ever arrive.

The company is not at liberty to abandon the railway, and throw the land into the market at any time it pleases. The land was taken for public use, and the public will be likely to demand a continuance of that use.

The benefits resulting from this improvement are not permanent, but will, in time, cease to exist. Probably before the appellants can experience any practical advantage from this pavement, it will have given place to the other improvements, so that the supposed benefits are in fact inappreciable.

The reasoning of the late Chief Justice of this court in *City of Bridgeport v. The New York & New Haven Railroad Company*, 36 Conn. 255; S. C., 4 Am. Rep. 63, applies to these cases.

The Superior Court is advised to annul the assessments.

In this opinion PARK, C. J., and PARDEE, J., concurred; FOSTER and PHELPS, JJ., did not sit.

STATE V. WILCOX.

(42 Conn. 364.)

Constitutional law — local option laws.

A statute authorized county commissioners to grant licenses for the sale of intoxicating liquors in the several towns, upon a recommendation of the selectmen of the town and provided that any town might at its annual meeting, by ballot, prohibit the selectmen from making such recommendations, and forbade the sale of liquors by any one not so licensed. *Held*, that the statute was constitutional as it was not a delegation of legislative power to the towns.

COMPLAINT by grand juror for selling intoxicating liquors without a license; brought to a justice of the peace, and by appeal of the defendant from the judgment of the justice, to the Superior Court in Litchfield county. In that court the case was tried to the jury, on the plea of not guilty, before SANFORD, J., and the defendant found guilty, and a fine of \$50 was imposed by the court. He then moved in arrest of judgment on the following grounds:

First. Because the act entitled "An Act in addition to an Act con-

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cerning Crimes and Punishments," approved August 1st, 1872, and the act entitled "An Act in alteration and addition to an Act entitled 'An Act in addition to an Act concerning Crimes and Punishments,'" approved July 25th, 1874, making unlawful the sale of spirituous liquors in one town, and lawful in another, by the vote of the town, are void and unconstitutional, not being complete and positive in themselves, but depending upon other bodies than the legislative to give them effect, and liable to be repealed by other bodies; thus being contrary to the limitations of legislative power necessarily involved in a representative republican form of government.

Second. Because the court has no power or authority under either the statutes of 1872 or of 1874 to impose any fine or other punishment.

This motion being overruled, the defendant brought the record before this court by a motion in error.

The part of the act of 1874 on which the question in the case arises, is as follows:

"The board of county commissioners of each county in this State shall, at any regular meeting, by an instrument in writing under their hands, license and authorize any suitable person or persons to sell or exchange spirituous and intoxicating liquors, ale and lager beer, in the several towns in said county; *provided* that said license or licenses shall only be given to such person or persons as shall be recommended by a majority of the selectmen of the town where such business is to be carried on, as suitable and fit therefor. * * * * *

And any town may, at its annual town meeting in each year, determine by ballot, by a major vote of the electors present and voting at said meeting, whether the selectmen of the town shall make any recommendations for the granting of licenses under this act, and the polls for this vote shall be open during the same hours as for the other votes of said meeting. And it shall be lawful for any town to vote, in manner herein otherwise provided, either to issue licenses generally for the sale of all kinds of spirituous liquors, ale, lager beer, etc., or to issue licenses whereby only those liquors enumerated in section 4 shall be permitted to be sold; and if any town shall instruct the selectmen thereof not to make such recommendations, then the selectmen shall be prohibited from making any recommendations for the granting of licenses."

An act on the same subject passed in the year 1872 contained substantially the same provisions as the above. Both statutes forbade the sale or exchange of intoxicating liquors, ale and lager beer, without a license. The act of 1872 imposed a penalty of \$50 for every violation of the act. That of 1874 omitted the penalty, and by a final clause repealed all acts and parts of acts inconsistent with it.

H. H. Barbour, Jr., for plaintiff in error.

Huntington, for the State.

FOSTER, J. That the judgment below was erroneous is claimed in the brief of plaintiff in error on two grounds :

1. That the law is unconstitutional ;
2. That, if constitutional, it provides no penalty for its violation.

That the legislature has power to regulate the sale of intoxicating liquors, to appoint boards to grant licenses to sell, and to impose fines and penalties for selling without license, is not denied. The claim is, that the legislature, instead of exercising this power, has delegated it to people, contrary to the provisions of our constitution, which vests the legislative power in the Senate and House of Representatives.

This question has often been raised in different States of the Union, and has been especially and frequently urged as an objection to laws relating to the sale of intoxicating liquors ; “ local option laws,” as they have sometimes been styled.

While all courts have agreed that legislative power cannot be delegated, there is often great diversity of opinion as to what constitutes such delegation of power. In the case of *The People v. Collins*, 3 Mich. 343, a prosecution under a liquor law, the court, made up of eight judges, were unanimous in holding that legislative power could not be delegated, yet four members of the court, in apparently well-considered individual opinions, held the law unconstitutional, and therefore void, because it was an exercise of delegated power ; while the other four judges, in separate opinions, apparently equally well-considered, were of opinion that there had been no delegation of legislative power, and that the law was constitutional and binding.

Among the States which have legislated on this subject, laws have been pronounced unconstitutional by the courts because there was a delegation of legislative power, in the States of Delaware, Pennsylvania, Texas, Indiana and Iowa. *Rice v. Foster*, 4 Harr. (Del.) 479 ; *Parker v. The Commonwealth*, 6 Penn. St. 507 ; *State v. Swisher*, 17 Texas, 441 ; *Meshmeier v. The State*, 11 Ind. 482 ; *State v. Weir*, 33 Iowa, 134 ; 11 Am. Rep. 115. The case of *Rice v. Foster* is the leading case. It was exhaustively argued by distinguished constitutional lawyers, and very fully considered. The law of Delaware, however, was so different from ours, that the case can hardly be considered applicable as an authority. The same may be said, substantially, of the other cases referred to.

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On the other hand, the decisions of the courts in the States of Massachusetts, New Hampshire and New Jersey, among others, have upheld as constitutional laws passed in those States respectively, similar in character, though differing in detail and sometimes in principle, from those in which the other States have been held invalid. *Commonwealth v. Bennett*, 108 Mass. 27 ; *Commonwealth v. Dean*, 110 id. 357 ; *State v. Noyes*, 10 Foster, 279 ; *State, ex rel. Sandford, v. Court of Common Pleas*, 36 N. J. Law, 72 ; S. C., 13 Am. Rep. 422.

In this apparent conflict of authorities, though the conflict is at times more apparent than real, as the statutes of the different States differ so widely, it seems proper to examine carefully the provisions of our own statute.

The act of 1872, entitled "An Act in addition to an Act concerning Crimes and Punishments," provides, in the first section, that the board of county commissioners of each county shall, at any regular meeting, by an instrument in writing under their hands, license and authorize any suitable person or persons to sell spirituous and intoxicating liquors, etc., in the several towns in said county ; provided that said license or licenses shall be given only to such person or persons as shall be recommended by a majority of the selectmen of the town where such business is to be carried on, as suitable and fit therefor. The same section of the law provides that each person, before receiving a license, shall file with the board a bond to the treasurer of the county, of a specified amount, for the observance of all laws that are or shall be made respecting taverns and spirituous liquors ; that said license shall continue in force for one year and no more ; and that any town may, at any meeting duly warned and held for that purpose, by a major vote of the electors present, instruct their selectmen not to make any recommendation for the granting of licenses. Further details as to the law are contained in other parts of the act, and the fourth section provides a penalty for any person who shall sell without a license — a fine of not less than fifty nor more than five hundred dollars, or by imprisonment not exceeding six months, or by such fine and imprisonment both.

We are unable to discover any constitutional objections to this law. There is no legislative power delegated to the people, none to the county commissioners, none to the selectmen. The law is perfect and complete as it comes from the hands of the law-making power. Selling intoxicating liquors without a license is made an offense, universally and positively, and a penalty is provided for transgressors. Licenses may be granted by the county commissioners to suitable persons, if recommended by a majority of the selectmen, and the towns may

instruct their selectmen not to recommend any persons. But these are not legislative powers. They are police regulations, quite fit and proper to be exercised by municipalities, county commissioners, or boards of selectmen, for the protection of the morals and health, and the promotion of the prosperity, of their particular localities. Similar powers have been granted in the charters of cities and boroughs for a long course of years, and we are not aware that their constitutionality has ever been questioned.

The case of *Commonwealth v. Blackington*, 24 Pick. 352, was an indictment against the defendant for retailing spirituous liquors without a license. The law of Massachusetts, at that time, vested the power of granting licenses in the county commissioners on the recommendation of the selectmen, substantially as in the statute we are now considering. The county commissioners expressed an opinion, generally, that in their judgment the public good did not require that any licenses should be that year granted to retailers; in consequence of which the defendant was deterred from applying for a license, or procuring a recommendation from the selectmen. The defense was put on various grounds, and, among others, the unconstitutionality of the law. Various reasons were assigned why the law was unconstitutional, but the one now urged, that the legislature could not thus delegate the power reposed in them, was not suggested. The defendant's counsel claimed that the commissioners had no power to refuse generally to grant licenses, and to show that they had not such power, they referred to a law passed by the General Court, after the act charged in the indictment was committed in which it was provided that nothing contained in the former law should be so construed as to require the county commissioners to grant any licenses when in their opinion the public good did not require any to be granted. This manifestly delegated the same power to the county commissioners as, under our statute, is delegated to the towns. The court sustained the law, but neither court nor counsel alluded at all to the objection now taken, that there was an attempt to delegate legislative powers, and that the law was therefore a nullity.

But it is claimed that this act of 1872, on which we have commented, is repealed by the act of 1874, and that this latter act, besides its unconstitutionality, lacks what is the effective part of every law, a penalty for its violation.

The act of 1874 is entitled "An Act in alteration of and in addition to an Act entitled an Act in addition to an Act concerning Crimes and Punishments."

Now this act of 1874 re-enacts, in terms, that part of the act of 1872

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which provides for licensing the sale of intoxicating liquors, a summary of which we have given above. It makes some additional provisions and some alterations in matters of detail. The bonds of persons taking a license expire on the 31st day of October, in each year. The towns at the annual town meeting may determine by ballot by a major vote, whether the selectmen should make any recommendation for the granting of licenses generally, for the sale of all kinds of spirituous liquors, etc., or to issue licenses whereby only ale, lager beer and Rhine wine may be sold. The county commissioners are authorized, under the provisions of this act (of 1874) and the one to which it is an addition (of 1872), to grant licenses for the sale of the last-named liquors only, upon the payment of a specified fee.

We see no good cause for pronouncing this law unconstitutional. No power is delegated which the constitution requires the legislature to exercise. Indeed the power delegated is not legislative in its character, and so may properly be exercised by the municipalities and local functionaries to whom it is committed. They have the means of exercising it more intelligently than the legislature itself.

The act of 1874 does not repeal the act of 1872. It is in alteration of and in addition to it. No act is repealed by the act of 1874 except such as are inconsistent with it, and very few of the provisions of the act of 1872 are so. The fourth section, which provides the penalty for selling without license, certainly is not. That remains law. The period of time for which bonds taken are to run is altered, but we regard that as unimportant, for the rights of parties whose bonds run beyond the 31st of October, 1874, under the law of 1872, are expressly saved in the law of 1874.

Numerous authorities of the highest respectability sustain the views and principles which we have here expressed.

In the case of *Commonwealth v. Bennett*, 108 Mass. 27, the defendant was prosecuted for violating the liquor law of Massachusetts, and the objection was taken that the law was void because the legislature had delegated the power of passing it. The Massachusetts law, to say the least, was quite as obnoxious to this objection as our law, and the constitution of Massachusetts vests the legislative power in the same manner as it is vested in our constitution. The law was held constitutional.

In a very recent case (*Commonwealth v. Dean*, 110 Mass. 357, a prosecution of the same character), the same objection was taken, and the court say that the constitutionality of the law must be regarded as settled.

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In the case of *State v. Noyes*, 10 Foster, 279, the Supreme Court of New Hampshire sustained very fully the same doctrine.

The case of *State ex rel. Sandford v. Court of Common Pleas*, 36 N. J. Law, 72; S. C., 13 Am. Rep. 422, arose under a statute of that State termed "the Chatham local option law." The provisions of that act were substantially, that it should be lawful for the persons qualified to vote at the next annual town meeting, to determine by ballot whether thereafter license to sell spirituous liquors should be granted; and that if it should appear that a majority of votes were cast for "no license," it should not thereafter be lawful to grant any such license until otherwise decided by a contrary vote at some subsequent town meeting. This law is ours, in principle, and almost in detail, and the Supreme Court of New Jersey held it to be valid and constitutional.

The case of *Locke's Appeal*, 72 Penn. St. 491; S. C., 13 Am. Rep. 716, involved the constitutionality of a law which submitted the question of "license or no license" to sell intoxicating liquors, to be voted upon by one of the wards in the city of Philadelphia, and to be decided by a majority of the votes. Judge AGNEW, speaking for a majority of the court, in a very able and elaborate opinion sustained the law. The former decisions were examined and some were overruled. This was in 1873, and it is one of the latest cases on this subject which has fallen under our observation.

We are all satisfied with the decision below, and think there is no error in the judgment complained of.

In this opinion the other judges concurred.

NOTE.—Beside the cases cited above, see *Ex parte Wall*, 17 Am. Rep. 425; and *Fell v. State*, 42 Md. 71.—REP.

KNOWLES V. PECK.

(42 Conn. 386.)

Conspiracy — to induce one to violate an injunction. Privileged communications.

At the suit of the owner of a patent for vulcanized rubber, A, a dentist, was enjoined from using the preparation. Believing that A disregarded the injunction the owner employed B to ascertain. B procured C to apply to A for a set of teeth upon a plate of vulcanized rubber. A made the teeth upon such plate, delivered them to C, and received pay therefor. B and C reported the facts to the owner, and on their affidavits, proceedings for contempt were commenced against A. Held, that B and C were not liable for a conspiracy to induce A to violate the injunction; that the owner of the patent had a right to resort to this method of learning the facts and that the communications of B and C to the owner of the patent were privileged.

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TRESPASS on the case for a conspiracy to injure plaintiff. The opinion states the case.

The jury returned a verdict for the defendants, and the plaintiff moved for a new trial for error in the rulings and charge of the court.

H. T. Blake, with whom were *Turrill* and *E. W. Seymour*, in support of the motion.

A. P. Hyde, with whom were *Cothren* and *Andrews*, contra.

PARDEE, J. Upon the application and complaint of H. B. Goodyear and others, owners of certain patents for a new and useful improvement in the manufacture of india-rubber, the United States Circuit Court for the District of Connecticut on the 7th day of December, 1868, enjoined the plaintiff from making or selling any dental plates or other articles made of india-rubber mixed with sulphur.

The patentees, believing that the plaintiff disregarded the injunction, were desirous of knowing whether he still kept in his possession the substance known as vulcanized rubber, which was the subject of one of their patents, and whether he would use or sell it in any manner or under any circumstances, and if so, in what manner and under what circumstances; what he would do and how far he would go in the direction of a violation, if opportunity presented itself to him. They, therefore, through Bacon, their general agent, and through Peck, one of the defendants, their special agent for this particular matter, sent Jeffreys, the other defendant, to the plaintiff, with instructions to ask him to make for Jeffreys a set of teeth upon a hard rubber plate. This request the plaintiff complied with in the manner set forth in the motion. He delivered the teeth to Jeffreys and received eight dollars therefor. Subsequently Jeffreys made, and Peck sent to the patentees, the affidavit set out in the motion, upon the making and sending of which this action is based.

The case as presented by the motion, taken in connection with facts determined by the jury, does not disclose any initiatory act, in combination or otherwise, on the part of the defendants to induce the patentees to institute proceedings in the Circuit Court of the United States against the plaintiff. On the contrary the patentees began to seek for the information of their own motion, and their first action was prompted by a suspicion which they already entertained. They subsequently called the defendants to their aid as assistants or agents in obtaining knowledge which might thereafter be of value to them in the protection of their patents, if they should see fit to avail themselves of it.

The plaintiff admits, in substance, that the plate made for Jeffreys was made for him as an ordinary customer and in ignorance of the reason for his application therefor ; that he did not then act, or believe that he had any right to act, as licensee of the patentees ; that they had not intended to grant, and he had not intended to receive, any such right ; and that it was contrary to the will of both parties that the relation of licensor and licensee should exist between them.

And if it be conceded that, by reason of the fact that the patentees asked the defendant Jeffreys to test the intention of the plaintiff, his request of him to make and sell the plate involved an offer on their part to the plaintiff of a permission to do the act, yet the plaintiff, being utterly ignorant of such offer, did not then actually accept it by word or deed. The question as to his interest remains unaffected. What he then did was done in furtherance of his intention to sell the plate without paying a royalty thereon.

The case does not call upon us to determine whether for an act performed under such circumstances the court would or would not punish the plaintiff for a violation of the injunction. The patentees, for the better protection of their property, had a right to resort to the method adopted by them of learning whether he had the patented material in his possession and his intention as to the use and sale thereof ; and under the circumstances of this case Jeffreys was entitled to the privilege of communicating to them the knowledge thus obtained by him upon these points. And even if we should concede that his communication involved an erroneous conclusion on his part as to the legal consequences which would follow the act of the plaintiff as described in the affidavit, the court properly submitted to the jury the question as to the malicious intent or the good faith of the defendants in making and sending it to the patentees. The charge falls within the principle laid down in the following cases.

In *Harrison v. Bush*, 32 Eng. Law & Eq. 173, Lord CAMPBELL, C. J., said : “ A communication made *bona fide* upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminary matter which, without this privilege, would be slanderous and actionable. Duty, in the proposed canon, cannot be confined to legal duties which may be enforced by indictment, action or mandamus, but must include moral and social duties of imperfect obligation.”

In *Toogood v. Spyring*, 1 Crompt. Mees. & Rosc. 193, PARKE, B., said : “ If communications be fairly warranted by any reasonable occasion or

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exigency and honestly made, such communications are protected by the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

In *Coxhead v. Richards*, 10 Jurist, 984, TINDAL, C. J. said: "I do not find the rule of law so narrowed and restricted by any authority that a person having information materially affecting the interests of another, and honestly communicating it, in the full belief, and with reasonable grounds for the belief, that it is true, will not be excused, though he has no personal interest in the subject-matter."

In *Cockayne v. Hodgkisson*, 5 Car. & P. 548, PARKE, B., said: "I have already said that every willful and unauthorized publication to the injury of the character of another is a libel; but where the writer is acting on any duty, legal or moral, toward the person to whom he writes, or where he has by his situation to protect the interest of another, that which he writes under such circumstances is a privileged communication."

The rule is thus stated by the court in the case of *Lewis v. Chapman*, 16 N. Y. 369: "There is no doubt that where the communication is made *bona fide* in answer to inquiries from one having an interest in the information sought, or where the relation between the parties by whom and to whom the communication is made is such as to render it reasonable and proper that the information should be given, it will be regarded as privileged."

In the case of *Washburn v. Cooke*, 3 Denio, 110, determined in the Supreme Court of the State of New York, and cited approvingly in the case of *Lewis & Herrick v. Chapman*, BRONSON, C. J., said: "In this case it may be collected from the evidence given, and from that which was offered and rejected, that the sheriff had made a levy upon certain cattle which had afterward been wrongfully driven away, in consequence of which the sheriff was likely to suffer damage; that the sheriff thereupon employed the defendant to ascertain and inform him of the facts in relation to the wrong which had been done and to advise what course it was best to pursue; and that the defendant wrote the letter in question to his employer, concerning the subject-matter of his employment. It was the communication of an agent to his principal, touching the business of his agency, and not going beyond it. The charge of larceny, of which the plaintiff complains, was directly pertinent to the matter in hand; and I think the letter must be regarded as a privileged communication. The occasion upon which it was written sufficiently rebuts the inference of malice, which under other circumstances would have arisen from the injurious nature of the charge. In such a case, al-

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though there may be no proof of the truth of the accusation, and even though it may be shown to be false, the jury are not to render a verdict for the plaintiff as a matter of course. They must first be satisfied, on looking at the whole case, that the defendant did not act honestly, and in good faith, but intended to do a wanton injury to the plaintiff."

In *Bradley v. Heath*, 12 Pick. 164, SHAW, C. J., says: "When words imputing misconduct to another are spoken by one having a duty to perform, and the words are spoken in good faith and in the belief that it comes within the discharge of that duty, or where they are spoken in good faith to those who have an interest in the communication and a right to know and act upon the facts stated, no presumption of malice arises from the speaking of the words, and therefore no action can be maintained in such case without proof of express malice."

In *Gassett v. Gilbert*, 6 Gray, 97, BIGELOW, J., says: "A party cannot be held responsible for a statement or publication tending to disparage private character, if it is called for by the ordinary exigencies of social duty, or is necessary and proper to enable him to protect his own interest, or that of another, provided it is made in good faith and without a willful design to defame."

A new trial is not advised.

In this opinion the other judges concurred.

KIRTLAND V. HOTCHKISS.

(42 Conn. 426.)

Taxation — for money loaned and secured out of the State.

A State legislature has power to tax persons residing in the State for money lent by them to persons residing out of the State and secured upon real property out of the State.

PETITION for an injunction against the levy of certain tax warrants upon the real estate of the petitioner and the collection of certain taxes from his property, brought to the Superior Court in Litchfield county.

The respondent was tax collector of the town of Woodbury in Litchfield county, Connecticut, in which town the petitioner resided at the time his property was assessed and the taxes in question laid. The property taxed, so far as the taxes were claimed to be illegal, was an amount invested in bonds in the city of Chicago in the State of Illinois, secured

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on real estate in that city by deeds of trust, which deeds were held by the trustee in Chicago; the Board of Relief of the town of Woodbury having added to the assessment list of the petitioner in the year 1869 the sum of \$18,000 on this account, and in the year 1870 the sum of \$20,000. It appeared that the deeds of trust contained a provision that all taxes and assessments on the property conveyed thereby should be paid by the obligor, without abatement on account of the mortgage lien, and that the property might be sold at auction in the city of Chicago, by the trustee, upon twenty days' notice, in case of any default of payment or failure of the obligor to perform any of his covenants, and that a good title, free from any right of redemption on the part of the obligor, might in that case be given by the trustee. It was also stipulated that the loan was made under and was to be governed by the laws of Illinois. It also appeared that the loan had been since paid up when it became due, and had been re-invested by the trustee in the city of Chicago in the same manner. The respondent had as tax collector levied his tax warrants on the real estate of the petitioner in Woodbury and advertised it for sale.

The court found the above facts and reserved the case for the advice of this court.

Cothren, for petitioner.

Huntington and *E. W. Seymour*, for respondent.

CARPENTER, J. The question for our consideration in this case may be stated thus: Is a citizen of this State liable to pay taxes on money loaned out of the State? The question resolves itself into two inquiries; first, does the statute require money so loaned to be taxed? second, has the legislature power to tax it?

Concerning the first question little need be said. The statute in force when the taxes under consideration were levied, is as follows: "Personal property, in this State or elsewhere, not expressly exempted by this act, shall be deemed, for the purposes of taxation, to include all moneys, credits, choses in action, bonds, notes, stocks (except United States stocks), goods, chattels, or effects, or any interest therein; all ships and vessels propelled by steam or wind, whether at home or abroad, or whether registered, enrolled or licensed in this State or elsewhere, or any interest, either legal or equitable, therein; and such personal property, or interest therein, being the property of any person resident in this State, shall be valued and assessed at its just and true value at the time of such assessment, and set in the list at its actual valuation, in the list

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of the town where the owner resides, except when otherwise provided ; but this section shall not be deemed to embrace money or property actually invested in the business of merchandising or manufacturing, when located out of this State." Gen. Statutes, Rev. of 1866, p. 7.9, § 8.

The first part of this statute is broad enough to include not only debts due from other citizens of other States, but also goods and chattels without the State. The latter however are exempt by the terms of section 24, page 713. The 8th section also exempts money or property invested in the business of merchandising or manufacturing out of the State. These exemptions are in the nature of exceptions, and clearly imply that but for them all such property would be taxable by the letter of the statute.

There is no such exception in favor of debts due from parties out of the State, and hence the reasonable construction of the statute is, that such debts are taxable. To remove all doubt on the subject the legislature in 1872 made them taxable in more explicit terms. We regard that statute as explanatory of the act under consideration, and not an alteration thereof. We entertain no doubt therefore as to the intention of the legislature. Indeed this point is not seriously controverted.

The second and most important question in the case is, whether the legislature has power to tax money so invested.

Unlike some of the States we have no constitutional provision limiting and defining the power of taxation. The case therefore does not depend upon the construction of any particular provision of our constitution, but it involves a consideration of the principles of natural right and justice.

The petitioner insists that it is a case of extra-territorial taxation ; that the legislature has attempted to reach its hand beyond the limits of the State, and lay hold of property situated in other jurisdictions and subject it to taxation here. It is agreed that real estate cannot be so reached ; and visible, tangible personal property is practically upon the same footing by the provision of our statute.

As we have already seen, the statute clearly distinguishes between choses in action and goods and chattels. The reasons for this are obvious ; and they are reasons, not only for the exercise of the power of taxation in respect to the former, but also, to some extent, for the existence of the power as well. We do not care, however, to refer to reasons based upon expediency or public policy. Although arguments may be drawn from both these sources sustaining the power contended for, yet they are, in the main, arguments which address themselves to the discretion of the legislature.

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We shall therefore limit our discussion to two inquiries : 1. As to the place and manner of taxing debts heretofore, and legislation affecting the question. 2. As to the nature and character of the property under consideration.

Our present statute expressly requires the taxation of " notes, bonds, and stocks (not issued by the United States), moneys, credits, choses in action," etc., and it provides that " such property, belonging to any resident in this State, shall be set in his list *in the town where he resides*, at its then actual valuation, except when otherwise provided ; but money secured by mortgage upon real estate in this State shall be set in the list and taxed only in the town where such real estate is situated." This statute assumes that notes, bonds, and other choses in action, for the purposes of taxation, are situated where the creditor resides. In this respect the present does not differ materially from prior statutes, since money at interest has been a subject of taxation. It is believed that it has been uniformly taxed where the creditor resides, except in the single instance of money secured by mortgage on real estate, in which case it is taxable where the real estate is situated. This provision is of modern origin, and grew out of another provision allowing the debtor to have deducted from his own list the amount of the debt, and requiring it to be set in the list of the creditor.

In the Revised Statutes of 1866, in the list of property exempt from taxation, are found the State bonds, issued under the act of 1865.

In 1869 certain towns were authorized to issue bonds to aid in the construction of railroads, and it is provided that they " shall be exempt from taxation in the hands of the holders of such bonds." And the bonds of certain railroads in this State are in like manner exempt. These statutes clearly imply that such bonds, if not thus exempted, would be taxable under the operation of the general statute, in the towns and cities where the holders thereof resided.

The act of Congress of March 3d, 1863, authorizing the issue of bonds, etc., provides as follows : " And all the bonds and treasury notes or United States notes issued under the provisions of this act shall be exempt from taxation *by or under State or municipal authority.*" U. S. Stat., 1863, p. 710. But for this provision such bonds would have been taxable ; and they could only have been taxed by State or municipal authority through the holders ; clearly showing that such bonds, for the purpose of taxation, have a *situs* where the owner resides.

We proceed in the second place to consider the nature and character of a debt or chose in action.

It has not a visible, tangible form. The note, bond, or account even,

may be evidence of a debt, but it is not the debt itself. The specific money when loaned, and received by the borrower, is no longer the property of the creditor. It is soon merged in the circulating mass, and the creditor can neither identify and claim it, nor put his hand upon any property purchased with it, and say that that is his. The money may be invested in real estate, or manufacturing, or merchandising, or speculation. It may prove a profitable investment, or it may in a short time prove a total loss. It is all the same to the creditor so long as his debtor's ability to pay is unimpaired. He has simply a right to receive a given sum of money with interest or damages for its detention. It is a personal right, and accompanies the person of a creditor. The debtor is under a corresponding obligation to pay the demand. The right to receive is valuable, and through it an income is derived. That right may with propriety be taxed. The obligation to pay is a burden, and has never, to our knowledge, been the subject of taxation. It seems to us therefore that the appropriate place to tax money at interest, is where the creditor resides, and that for that purpose it may with propriety be said to be located with the creditor.

In respect to the question now under consideration, there is a strong analogy between a money demand, evidenced by a note or bond, and shares of stock in a corporation. The Supreme Court of the United States has decided that shares of stock in national banks are property separate and distinct from the property of the corporations which they represent. *Van Allen v. Assessors*, 3 Wall. 573; *Bradley v. The People*, 4 id. 459; *Nat. Bank v. Commonwealth*, 9 id. 353. In the last case the State of Kentucky levied a tax upon the shares of stock in the bank, payable by the cashier. It was held that there was a distinction between the shares of stock and the capital of the bank; that the latter, when invested in government bonds, was not taxable; that shares of stock, notwithstanding the investment of the capital government bonds, were taxable.

In the case of *Minot v. The Philadelphia, Wilmington & Baltimore Railroad Co.*, 18 Wall. 206. a distinction is made between shares of railroad stock and the property of the corporation. The State of Delaware levied a tax of one-fourth of one per cent upon the actual cash value of every share of the capital stock of the defendant corporation, with a proviso that the company should only be required to pay the tax on such number of the shares of its capital stock as would be in that proportion to the whole number of shares which the length of the road within the limits of the State should bear to the whole length of the road. It was claimed that this was a tax upon the shareholders, and that, as

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the proportion of shareholders residing in the State was less than the proportion of the length of the road lying within the State, it was an attempt to tax property beyond the jurisdiction of the State.

In respect to this claim the court, on page 229, says: "If such be the fact the tax to that extent is invalid, for the power of taxation of every State is necessarily confined to subjects within its jurisdiction.

* * * And the argument is, that if the tax be laid upon the shares of the stockholders it falls *upon property out of the State*, because nearly all the stockholders, at least a much greater number than the ratio of the mileage of the road in Delaware to its entire length, are citizens and residents of other States; and if the tax be laid upon the shares as representing the property of the corporation, it falls upon property out of the State, because the ratio of the mileage of the road in Delaware to its entire length is not that which the capital invested by the company in that State bears to the entire capital of the company, or that which the value of the property of the company there situated bears to the value of its entire property. If the assumption of the appellant were correct, there would be difficulty in sustaining the validity of the tax. The share of a stockholder is, in one aspect, something different from the capital stock of the company; the latter only is the property of the corporation; the former is the individual interest of the stockholder, constituting his right to a proportional part of the dividends when declared, and to a proportional part of the effects of the corporation when dissolved, after payment of its debts. Regarded in that aspect it is an interest or right which accompanies the person of the owner, having no locality independent of his domicile. But whether, when thus regarded, it can be treated as so far severable from the property to which it relates as to be taxable independently of the locality of the latter, is a question not necessary now to decide."

The precise question involved in the present case was not decided in that; but there is a strong intimation that shares of railroad stock can only be taxed in the State where the owner resides.

The case of *Dwight v. Mayor, etc., of Boston*, 12 Allen, 316, is a strong case on this point. The plaintiff, a shareholder in a foreign corporation, claimed a deduction from the tax on his stock on account of the tax on the property of the corporation in the State where it was situated. The court denied the validity of his claim. The court says: "But our whole system of taxation as established and practiced is to disregard the liability of shares in foreign corporations to taxation in the States where they are situated. Thus shares in a foreign railroad corporation held by citizens of this State are fully taxed here, and no deduction is made for

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any taxation to which the corporations are subject in the States where they are situated. So it is in regard to shares held by our citizens in banks, insurance companies, and other moneyed corporations, situated in other States. Such shares when held by our citizens are here treated as so much personal estate, following the person of the owner, and taxable at their full value in this Commonwealth, regardless of what may be the foreign law as to taxation of the capital or any part of it elsewhere."

If the doctrine of these cases is sound, and we do not wish to intimate that it is not, we may with even more propriety distinguish between the property of a creditor in a debt, and the property of the debtor.

The case of *Catlin v. Hull*, 21 Vt. 152, a case cited and much relied on by the plaintiff's counsel, recognizes this distinction, and also the liability of the creditor to be taxed where he resides. A person residing in New York owned personal estate, consisting of notes and other obligations of debtors residing in the State of Vermont. These he deposited with the plaintiff residing in that State, as his agent, for management, collection and investment, and the plaintiff being such agent was assessed in that capacity for the estate thus in his hands. The Superior Court sustained the tax, but on page 161 the court say: "And as this power of taxation in this State is only to be exercised in cases where such property is not shown to be taxed to the real owner, where he resides, we think that there is no reason for saying that this power has been exercised in any unjust spirit, or that its exercise shows any want of proper comity in our State government."

Of the many cases cited by the petitioner's counsel, only one seems to be directly in point, and that is *The People v. Gardner*, 51 Barb. 352. In that case, however, the question was whether the New York statute, which provides for the taxation of real and personal property situated within the State, extended to debts due from non-residents. The court held that it did not. The question was not whether the legislature had power to tax them, but whether it had in fact taxed them. In that case, *Catlin v. Hull*, *supra*, and *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224, are cited as sustaining the decision. In the latter case the plaintiff, residing in New York, was assessed in respect to capital invested in business in New Orleans, and in respect to chattels on his farm in New Jersey. The court held that the assessment was erroneous -- that the property assessed was not within the State. But the court clearly distinguishes between chattels and choses in action. The marginal note says: "Debts and choses in action in general follow the domicile of the owner." The language of the court is, after stating the conclusion to which they have arrived: "This conclusion is intended

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to embrace only property which is visible and tangible, so as to be capable of a *situs* away from the owner or his domicile ; and we do not consider the question in reference to personal estate of a different description. It must be within this State in order to be subject to taxation, for so is the statute ; *but that may be true of choses in action, and obligations for the payment of money due to the creditor resident here from a debtor whose domicile is in another State.* If the securities are separated from the person and domicile of the owner, and are actually in the hands of an agent in another State for collection, investment and reinvestment there, it may be that capital thus situated should be regarded as foreign and not domestic, in the absence of any *special statutory provision intended for such a case.* Questions of this character need not now be determined." This case therefore is not an authority sustaining the decision in *The People v. Gardner* ; and that case stands alone and unsupported. What the decision of the Court of Appeals will be upon this question remains to be seen.

The conclusion then to which we have come is, that it is competent for the legislature of this State to tax our own citizens in respect to money loaned by them to persons residing out of the State.

We advise the Superior Court to render judgment for the respondents.

In this opinion the other judges concurred ; except FOSTER, J., who dissented and who delivered a dissenting opinion.

DICKINSON'S APPEAL.

(42 Conn. 491.)

Descent — bastard.

A bastard in this State has inheritable blood for the purpose of collateral as well as lineal descent through him.

The estate of A held to be inheritable by B as heir at law, through C, his grandmother, a sister of A, and D, his mother, the illegitimate daughter of C.

APPEAL from a decree of a Probate Court approving the will of Eliza J. Cotton, deceased ; taken to the Superior Court in Middlesex county. The appellees, the executors of the will, filed the following plea in abatement of the appeal :

That the appellants ought not further to prosecute their appeal, nor ought the court to entertain further cognizance of the same, because the appellees say, that the said appellants had not at any time, either when

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said decree was passed or when said appeal was taken, nor have at this present time, any right, title or interest in or to the estate of the said deceased, or any part thereof, for the reasons following, to wit: The said Eliza J. Cotton, testatrix, died on the 22d day of November, A. D. 1874, at said Middletown, leaving a last will and testament which was duly proved and approved by the Court of Probate for the District of Middletown, by the said decree appealed from. The said testatrix was a maiden lady, having never been married, and leaving no parents, brothers or sisters, and no blood relative nearer than an own cousin. The appellants are legitimate children of an illegitimate daughter of Mary Cotton, a sister of the said testatrix. And at the same time of the decease of the said testatrix, her said sister Mary, and the illegitimate daughter of the said Mary, being the mother of the appellants, had both been dead for a period of more than fifteen years. All which the said appellees are ready to verify. Wherefore they pray that said appeal may be dismissed, and that the court will entertain no further cognizance of the same.

To this plea the appellants demurred, and the questions arising on the demurrer were reserved for the advice of this court.

FOSTER, J. The appellants are the grandsons of Mary Cotton, their mother being her illegitimate daughter. Mary Cotton was a sister of the testatrix, Eliza J. Cotton, and it is from the decree of the Court of Probate approving her last will that this appeal was taken. The mother and grandmother of the appellants had been dead some fifteen years at the time of the death of the testatrix, who was a single woman, having never been married. She left no parents, no brothers or sisters, and no blood relations, unless the appellants are to be so considered, nearer than cousins. In the Superior Court the appellees moved to dismiss the appeal on the ground that the appellants were not heirs at law of the deceased, and had no interest in or title to her estate. The question thus raised is reserved for the advice of this court.

Were this question to be decided by the common law of England we should, without hesitation, advise that the appeal be dismissed. The appellants derive their title through their mother, and succeed to the same rights to which she, if living, would succeed. She was an illegitimate. In the XCVII number of the Edinburgh Review, in an article on the law of legitimacy, Gardner Peerage case, it is stated that at the time of the conquest bastards could inherit land in England, and also in Wales before the statute of Wales, 18 Edw. I. If this were so, the law was soon changed. Glanville, the earliest writer on the common law, says "Neither a bastard, nor any person not born in lawful wedlock, can be,

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in the legal sense of the term, an heir." *Heres autem legitimus nullus bastardus, nec aliquis, qui ex legitimo matrimonio non est procreatus esse potest.* Lib. 7, Cap. 13. This rule, though modified in some respects by various acts of Parliament since passed, is, substantially, the law of England at this day.

The denial of all rights as an heir was not the only disability to which this class of persons was subjected in England. A bastard was the child of nobody; he was not entitled even to a name. It is, however, gravely asserted by the text writers that he might gain one by reputation. He did not take his mother's place of settlement, but was settled wherever he chanced to be born. As he was related to nobody he could have no heirs, except of his own body; and so if he left no descendants, his property escheated, and now, by law, escheats to the crown. *In re Wilcox Settlement*, L. R., 1 Div., Chan. 229. He was incapable of holy orders, and disqualified from holding any dignity in the church. In Germany, no farther back than the time of the Reformation, bastards could not give evidence on the rights of citizens, and down to a very recent period certain Saxon local laws enacted that no persons of illegitimate birth should officiate in any judicial office. Inquiries were made into the birth of a person, at the academies and schools, before he was admitted to the degree of doctor, and of any other high dignity. By the law of Scotland he was disabled, *ex defectu natalium*, from bequeathing by testament without letters of legitimation from the sovereign. By statute 6 Will. IV, 22, this disability was removed. The preamble of the act says: "Whereas, it is just, humane, and expedient, that bastards, or natural children, in Scotland should have the power of disposing," etc. By statute 7 and 8 Vict., Cap. 83, trustees or managers of savings banks are empowered to pay the money deposited by an illegitimate depositor dying intestate, to the persons who, in their opinion, would have been entitled to the same according to the statute of distributions, if he had been legitimate.

While the law was and is thus rigorous in its application to persons born out of lawful wedlock, it was remarkable for the liberality with which it regarded all those who were born in wedlock. No matter how soon after the marriage a birth followed, the offspring was legitimate. All children born during the coverture, though the wife lived apart from her husband in notorious adultery, were, for a long time, held legitimate, unless the husband was proved to be impotent, or beyond the four seas for so long a period before the birth as to make it a natural impossibility that he could be the father. As to posthumous children, the law, at times, has gone to foolishly absurd lengths to hold them legitimate. In

the time of Edward II, the Countess of Gloucester bore a child one year and seven months after the death of the duke, and it was pronounced legitimate. In the reign of Henry VI, Mr. Baron ROLFE expressed the opinion with apparent gravity, that a widow might give birth to a child seven years after her husband's death without injury to her reputation.

The Roman law was much less severe, and imposed fewer disabilities upon bastards than the common law. Bastards could inherit from their mothers. A distinction was made between illegitimates born of a concubine, and those born of a prostitute. The former were styled *naturales*, the latter *spurii*. The concubine had a legal relation to the family, which was sanctioned by the church down to the Council of Trent; and by subsequent marriage her offspring were made legitimate. The *naturales* were not only lawful heirs of the mother, but were entitled to support from the father. The *spurii* had no legal rights of inheritance or to a support.

The laws of the different States of our Union differ widely as to the rights of illegitimates. Most of the States have passed statutes mitigating more or less the rigors of the common law, and conferring rights which that law denied. The general tendency seems to be one of increasing liberality. In most, if not in all of the States, they inherit from the mother, and the mother from them. In some States they inherit from each other, from collateral kindred, and from the father, when there has been a general, notorious, and mutual recognition. In many of the States subsequent marriage of parents legitimates. Connecticut is one of the very few States, possibly the only one, that has passed no statute defining the rights of bastards. We have a common law of our own, built up from the usages and customs of our people, and from various judicial decisions. It differs from the common law of England and from the Roman law.

The earliest case in our reports, where the rights of this class of persons were judicially considered, is *Canaan v. Salisbury*, 1 Root, 155. That was a settlement case, and it was held that a bastard was settled with the mother. The court said that such a rule was agreeable to the law of nature and reason. This was in 1790, and was a clear departure from the common law of England, which did not permit an illegitimate child to inherit even a local habitation or a name from the mother. This case, though decided by the Superior Court, has never been doubted, but always recognized as sound law. It has been followed and sanctioned by this court in divers cases. *Hebron v. Marlborough*, 2 Conn. 13 *Windsor v. Hartford*, id. 356; *Danbury v. New Haven*, 5 id. 584 *Oxford v. Bethany*, 19 id. 229; *New Haven v. Huntington*, 22 id. 25.

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In the case of *Woodstock v. Hooker*, 6 Conn. 35, it was decided that a bastard born in Massachusetts, of a mother having a settlement in this State, took the settlement of the mother. PETERS, J., who gave the opinion of the court, said: "It has been discovered in this State that a bastard is the child of his mother." (p. 36.) In *Guilford v. Oxford*, 3 Conn. 321, it was decided that a bastard child took the new settlement of its mother acquired by marriage, though the marriage was procured by the fraud of the mother, she being pregnant at the time, and concealing that fact from her husband, who supposed her to be a chaste woman. In *New Haven v. Newtown*, 12 Conn. 165, it was held that the new settlement of a mother acquired by marriage was communicated to her illegitimate children, whether born before or after the marriage. WILLIAMS, C. J., said: "The fundamental maxim of the common law, that a bastard is *nullius filius*, is entirely rejected here, and such a child is here recognized by law as the child of its mother, with all the rights and duties of a child." (p. 170.) The cases of *Newtown v. Fairfield*, 18 Conn. 350, *Oxford v. Bethany*, 19 id. 229, and *New Haven v. Huntington*, 22 id. 25, are to the same effect. In *Bethlehem v. Roxbury*, 20 Conn. 340, CHURCH, C. J., said: "The feudal, repulsive doctrine of the common law, that a bastard child has no parent, no protector, not even a mother, has never found favor in this State."

In the case of *Brown v. Dye*, 2 Root, 280, it was decided that under our statutes of distributions a bastard might take as a brother to one who was born of the same mother. This was in 1795, and the decision was rendered by the Superior Court. The court said: "The common law of England, which has been urged in this case, is not to be mentioned as an authority in opposition to the positive law of our State, and nothing can be more unjust than that the innocent offspring should be punished for the crimes of their parents by being deprived of their right of inheriting by the mother, when there doth not exist among men a relation so near and certain as that of mother and child." The doctrine of this case was recognized and followed by this court in the case of *Heath v. White*, 5 Conn. 228, where it was held that a bastard might inherit real estate from his mother, as a child. That case apparently recognizes the relation of parent and child between the mother and her illegitimate offspring to be legally as perfect as between the mother and her legitimate offspring; giving the same rights, imposing the same duties.

It is abundantly clear from this examination of our law that we have departed very widely from the common law of England as applicable to illegitimates. We have been thus minute in the examination of the authorities, even at the expense of some prolixity, in order to deter-

mine whether the question before us has not, in effect, been long since disposed of; whether the principles recognized as established nearly a century ago, and ever since upheld and adhered to, are not conclusive.

We have seen that it was at first held that a bastard derived its settlement from its mother, and not from its place of birth. This was analogous to an interest derived by inheritance, and recognized the legal relation of parent and child.

It was next held that illegitimate children of the same mother could inherit from each other. This recognized the relation of brother and sister.

It was then held that an illegitimate child could inherit from its mother; and so the relation of parent and child was most directly recognized, and the reciprocal rights and duties growing out of that relation were thoroughly established.

The learned counsel for the appellees, admitting that a wide difference exists between our law and the English common law as to the rights of illegitimates, still insists that, under our law, their right, and the right of their descendants, is strictly lineal, never collateral; and so the appellants have no rights as heirs at law of the testatrix. In the expressive language of the counsel, though this progeny be grafted on the lineal stock, it has not been grafted on the collateral, and it is urged that this ought not to be done; that it will be taking another and farther departure from the wise principles of the common law, and that it will tend to encourage immorality and impair the sanctity of the marriage relation. These views have been pressed upon us so eloquently and so forcibly that we should regret to be thought insensible to the appeal.

If, however, we find the law to be in favor of the appellants, whatever we may think of its wisdom or its policy, we must so pronounce it. When the earls and barons of England, in the parliament of Merton, were asked by the bishops to change the laws of the realm and make those children who were born out of lawful wedlock, legitimate, by the subsequent marriage of their parents, as they were by the canon law, they made that reply which has since been so famous in history, *Nolumus leges Angliæ mutare*. Whether we are asked to abridge or extend the rights of illegitimates, our reply must be, not that we are unwilling, "*nolumus*;" or that we are willing, *volumus*; but that we are unable, *nim possumus*, to change the laws of Connecticut. That high prerogative has not been granted us. We sit here to declare the law, not to change it.

After as careful a consideration of the question as we have been able

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to give, we think that the points decided in the cases we have quoted tend strongly to the conclusion that these appellants, by the law of Connecticut, are heirs at law of the testatrix, Eliza J. Cotton.

We might, we think, safely rest our decision here, but as the question is one of much importance, our statute of distributions ought perhaps to be examined, and its construction considered, before reaching a positive conclusion.

The earliest provision in our colonial laws as to the distribution of estates was in 1639. At the October term of the General Court in that year, an order was passed directing the "orderers of the affairs of the towns," when any person should die intestate, "to cause an inventory to be taken, and then the public court may grant the administration of the goods and chattels to the next of kin, jointly or severally, and divide the estate to wife, if any be, children or kindred, as in equity they shall see meet," etc. Col. Rec. 1635 to 1665, p. 38. This order was embraced in the Code of 1650, usually styled Mr. Ludlow's Code. Id. 553.

In the revision of 1673 some alterations appear. After providing for the inventory, now to be made by the selectmen, and the granting of administration, the court was then directed "to divide the estate to wife, if any be, and children, or kindred according to law; and for want of law according to rules of righteousness and equity."

In 1699 our statute of distributions, properly so called, copied substantially from a law of Massachusetts of 1692, was passed. Some alterations have been made in it from time to time, but the clauses bearing on the question before us, "to and among his children, and such as shall legally represent them, and if no child to the next of kin to the intestate," have been changed but slightly in terms, and not at all in meaning. By the common law no doubt the term "child" and "children," when used in statutes, wills, and legal instruments generally, meant legitimate child and legitimate children, just as positively as if the term "legitimate" were prefixed. The case of *Dorin v. Dorin*, 7 Eng. & Irish App. 568, decided by the House of Lords during the past year, carries this principle to such an extent as in our opinion entirely to frustrate the intent of the testator and leave the corpus of the estate undisposed of. The still more recent case, *In re Ayle's Trusts*, L. R., 1 Chan. Div. 282, decided since this case was argued, holds the same doctrine.

We cannot think that this was the meaning which our legislature affixed to these words in this statute. That body was made up generally of plain men, and they made laws for plain men. That they understood the terms "child" and "children," so far as the mother was concerned, to comprehend her illegitimate, as well as her legitimate offspring, we

entertain no doubt. They used those terms in their common, popular signification, rather than with reference to any legal or technical sense. They had as little reference to the technical meaning of words in the English common law, as they had to the English law of inheritance, which they disregarded altogether. Looking more to the example of the Hebrew patriarchs and to Job, who gave his daughters inheritance among their brethren, than to the common law of England, they distributed lands to daughters, equally with sons, except that the eldest son took a double portion. The famous case of *Winthrop v. Lechmere* was an appeal from our colonial courts to the king in council. Mrs. Lechmere, the sister of Mr. Winthrop, had been granted a share with him in the lands of their father and uncle. The order in council on the appeal, passed in 1727, reversed all the decrees of our colonial courts in favor of Mrs. Lechmere, and pronounced our law for the settlement of intestate estates null and void.

In the revision of the laws in 1750 this preamble to the law appeared: "Whereas, the lands and real estate of persons dying intestate in this colony, by ancient and immemorial custom and common consent of the people, have descended to and among the children, or next of kin of such intestate, as heirs of such intestate," etc., etc. "Therefore be it enacted," etc. This preamble was probably all the apology which our colonial legislature was disposed to make for the discrepancies between our law of inheritance and the law of England. The importance of this preamble, in this connection, is to show that our law grew out of the customs and usages of the people. The terms used in it therefore should not be construed with reference to like terms in an act of parliament, but rather with reference to their ordinary, popular signification here in the colony. The numerous decisions which we have quoted from our reports, from the earliest to the latest, recognize the relation of mother and child, existing as well when the child was illegitimate as when legitimate. That an illegitimate child is as certainly next of kin to its mother as a legitimate child, seems to us a proposition that does not require proof. We think of no plausible reason that can be given to the contrary.

If the mother of these appellants had died before her marriage, leaving her mother, Mary Cotton, surviving, that mother would have been her heir at law. The testatrix, that mother's sister, on her death, would have been her heir at law. Thus the testatrix, indisputably, would have succeeded to the estate, had there been any, of her illegitimate niece. Would the death of the mother of the illegitimate niece have made any difference? Would not the testatrix still have been entitled as heir at law? As her sister's heir, would she not have been entitled to stand in

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her sister's place as her legal representative, and so claim as next of kin to the intestate? This was the precise question in the case of *Cooley et al. v. Dewey*, 4 Pick. 94. The uncle and aunt of a bastard claimed his estate as heirs at law, his mother being dead. The court, PARKER, C. J. said: "The merits of the appeal depend on the question whether the mother of the deceased, he being a bastard, was, within the meaning of our statute of distributions, his next of kin; for if she succeeded to his estate on his death, the appellant [her brother and sister] would of course take the whole between them, either as heirs of their sister, or, through her, as next of kin to the intestate." The court held that the law recognized no legal relation between a bastard and his mother any more than between him and his father; that being *nullius filius*, he was as much without mother as without father.

Our law is admitted to be otherwise, so far as the mother is concerned, and so far as rights of inheritance, lineally, are involved. The Supreme Court of Massachusetts, as we have shown, did not recognize the distinction now insisted on between lineal and collateral rights. They said that the mother could not inherit from the bastard, and therefore that the uncle and aunt could not. If the mother could inherit, then the uncle and aunt might and would inherit. As it is clear that in this State the mother would inherit, it would seem to follow as a necessary consequence that, she being dead, her sister would inherit, and so Eliza J. Cotton, the testatrix, would, in the case supposed, have been heir at law to the mother of these appellants.

Now if there be no obstacle, and we discover none, to having an estate pass from an illegitimate child through its mother to her collateral relations, can there be any obstacle to the passing of an estate from collateral relations, through its mother, to an illegitimate child? If any discrimination is to be made, ought it not to be the reverse of that claimed? Do not reason and justice loudly demand that the disability should fall on the erring parent rather than on the innocent child? *Culpa tenet auctoris*, is an old and just maxim.

A fair construction of our statute of distributions leads us therefore to the conclusion that these appellants have an interest as heirs at law, in the estate of the testatrix. Nor does it seem to us that in reaching this result we are making a farther departure than we have already made from the English common law. The cases heretofore decided in this State involve principles which must control this case, and the decision we make is necessary to vindicate those principles and preserve the symmetry of our law.

But the appellees quote to us a number of cases decided in States

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where, by statute, bastards are authorized to inherit from their mothers, and their mothers from them, and yet all right of inheritance among collaterals is denied.

To these cases we deem it a sufficient answer in the first place to say, that in all those States the doctrine of the common law as to a bastard, that he was *nullius filius*, was considered as established. The statute, being in derogation of the common law, was therefore to be construed strictly. The bastard was to inherit to the extent, and only to the extent, specified in the statute. If the statute gave him a morsel of bread, the common law gave him a stone if he asked to have that morsel of bread enlarged.

In Connecticut, as we have seen again and again, this doctrine of the common law as to bastards never obtained, and so these decisions lack applicability.

In the next place, an examination of these decisions will show that they are not all opposed to the rights now claimed by these appellants. The case of *Cooley v. Dewey* is, as we have seen, clearly an authority in favor of the appellants, if the right to inherit between the mother and an illegitimate child be established, as it is agreed to be by our law. To the other cases quoted from Massachusetts, *Curtis v. Hewins*, 11 Metc. 294, *Kent v. Baker*, 2 Gray, 535, and *Pratt v. Atwood*, 108 Mass. 40, it is sufficient to say, that the statute of Massachusetts, which made the bastard heir of his mother, had this limiting clause, "that he shall not be allowed to claim as representing his mother, any part of the estate of any of her kindred, either lineal or collateral." This statute was passed after the decision of *Cooley v. Dewey*.

The cases quoted from Vermont, *Burlington v. Fosby*, 6 Vt. 83, and *Bacon v. McBride*, 32 id. 585, were decided under a statute of that State. That statute provided "that illegitimate children shall be capable of inheriting and transmitting inheritances, on the part of the mother, in like manner as if they had been lawfully begotten." It was held in *Burlington v. Fosby*, that one illegitimate child could inherit from another illegitimate child of the same mother. Subsequently it was held in *Bacon v. McBride* that an illegitimate child could not inherit from a legitimate child of the same mother. This is clearly inconsistent with the doctrine of *Burlington v. Fosby*, the soundness of which is questioned by the latter case. *Burlington v. Fosby* is entirely in harmony with the decisions made by this court, and whether that case, or the case of *Bacon v. McBride*, is sustained by the better reasoning, we will not now attempt to decide. *Moore v. Moore*, 36

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Vt. 98, does not involve at all the question we are now considering, and only alludes to it by way of illustration.

In the case of *Stevenson's Heirs v. Sullivan*, 5 Wheat. 207, it was held that under the law of descent in Virginia, illegitimate children could not inherit from a legitimate child of their mother. This is quite inconsistent with *Brown v. Dye*, which we must consider law in this State.

The case of *Gibson et ux. v. Moulton*, 2 Disney, 158, was decided by the Superior Court of the city of Cincinnati, under a statute of Ohio similar in character to the statute of Vermont already quoted. It was held that this statute applied to inheritances in the ascending and descending lines only. This case, however, is directly contradictory to the case of *Lewis v. Eutsler*, 4 Ohio St. 354, where it was held that illegitimate children could inherit from an older illegitimate child of their mother. RANNEY, J., who gave the opinion of the court, says: "A man needs little more than his instincts to determine what the law ought to be in such a case." This case speaks approvingly of *Burlington v. Fosby*, and disapprovingly of *Stevenson's Heirs v. Sullivan*.

The high authority of Chancellor KENT is invoked to sustain the distinction between a bastard's right to inherit lineally and collaterally. Without instituting any comparison between men of renown in the profession, we may say that a former honored Chief Justice of this court, in his treatise on Descents, in commenting on the meaning of statutes which made illegitimate children capable of inheriting and transmitting inheritances on the part of the mother, in like manner as if they had been lawfully begotten, says: "By the terms, 'on the part of the mother,' we are to understand not only that the mother may inherit to the illegitimate children, and the illegitimate children to the mother, but that any relative on the part of the mother may inherit to the illegitimate child, and the illegitimate child may inherit to any relative on the part of the mother." Reeve on Descents, 96.

In giving this construction to our statute of distributions we simply carry out the construction long since adopted. That was, as we think, a correct interpretation of the will of the legislature. That the legislature for many intervening years has passed no act to amend or alter the law as decided, affords strong evidence that their will has not been misinterpreted. We prefer to stand *super antiquas vias*, rather than introduce a new policy.

Arriving as we do, unhesitatingly, at the result, both by the common law of this State, and by our statute of distributions, that these appellants are heirs at law of the testatrix, we shall add little, and perhaps should add nothing, as to the character or tendency of the law. The removal

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of disabilities from illegitimates, so as to leave them capable of inheriting and transmitting inheritances on the part of the mother collaterally, as well as lineally, like other persons, is sharply denounced. Facts, however, we believe fail to show either the immorality or impolicy of our law. We have been at some pains to examine the statistics on this subject, but have not been able to obtain returns from any of our sister States. We doubt if such returns are generally made. In ten years ending on the 31st day of December, 1874, there were born in this State 137,396 children, of which 1,118 (eighty one-hundredths of one per cent) were illegitimate; as small a ratio, we venture to assert, as can anywhere be found. In England, for three years prior to and including 1860, the ratio of illegitimate to legitimate births was over $6\frac{1}{2}$ per cent; and in Scotland, for ten years ending in 1870, it was 9.77 per cent. On the continent, so far as we have had access to the returns, the ratio is, generally, much larger. The number of illegitimates now in England and Wales alone is over one million. Surely it is not beneath the consideration of a wise statesmanship, whether it is just or prudent to cut off so large a portion of the population, who are charged with no crime, from all rights of inheritance, and isolate them almost absolutely from the body politic. In Guienne, near the beginning of the 14th century, a horde of banditti, organized and led by the illegitimate sons of noblemen, ravaged a portion of the country, and burned several towns, taking that mode of revenge for being denied their rights of inheritance.

In presenting our views thus fully, we regret that we have been compelled to occupy so much space. We advise the Superior Court to render judgment for the appellants.

In this opinion the other judges concurred.

HUBBARD V. CALLAHAN.

(42 Conn. 524).

Interest — agreement to pay after maturity — subsequent amendment of statute relating to — constitutional law.

A statute provided that the parties to a loan could contract for any rate of interest. Plaintiff made a loan to defendant, the latter agreeing to pay "interest, at the rate of fifteen per cent after maturity." Before maturity the statute was amended so as to provide that only seven per cent should be recovered for money lent, after maturity.

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Held, (1) that the fifteen per cent was not a penalty for the breach of the contract, but interest due under it; (2) that if the amendment was intended to apply to such contracts then in existence, it was unconstitutional and void as impairing the obligations of contracts.

ASSUMPSIT, on the following note :

“HARTFORD, September 2d, 1872.

“One year after date I promise to pay to the order of Susan V. Hubbard, five hundred dollars, at the Hartford Trust Company, value received, with taxes, and interest at the rate of fifteen per cent after maturity.

“MARTIN CALLAHAN.”

The suit was brought to the City Court of the city of Hartford and tried on the general issue before SUMNER, J.

It was admitted that none of the principal of the note and no interest thereon had been paid, and the only question between the parties was whether the note should draw interest after maturity according to its tenor, at the rate of fifteen per cent, or at the rate of seven per cent.

The court made a finding of the facts and rendered judgment for the plaintiff to recover at the rate of seven per cent. The plaintiff brought the record before this court by a motion in error.

The statute of 1872, in force when the contract was made, provided that it should be “lawful to contract for payment or receipt of any rate of interest,” with a provision that only six per cent should be recovered unless the agreement to pay the greater rate should be in writing. The act of 1873 provided that “no greater rate of interest than seven per cent per annum shall be recovered or allowed for the time after the money loaned becomes due.”

R. S. Welles, for plaintiff. 1. The agreement for interest after maturity in the present case was a “contract for a rate of interest” within the meaning of the act of 1872. *Beckwith v. Hartford, Prov. & Fishkill R. R. Co.*, 29 Conn. 268; *Adams v. Way*, 33 id. 419, 431; *Rose v. Phillips*, id. 570. 576; *Story’s Conf. of Laws*, § 296; 3 *Parsons on Cont.* 104; *Curtis v. Innerarity*, 6 How. 154; *Brewster v. Wakefield*, 22 id. 118, 127; *Daggett v. Pratt*, 15 Mass. 177; *Ayer v. Tilden*, 15 Gray, 178; *Wernwag v. Mothershead*, 3 Blackf. 401; *Kilgore v. Powers*, 5 id. 22; *Billingsly v. Cahoon*, 7 Ind. 184; *Parvin v. Hoopes*, 1 Morris. 294; *Wilkinson v. Daniels*, 1 Iowa, 188; *Richards v. Marshman*, 2 id. 217; *Wiswell v. Baxter*, 20 Wis. 680; *Weems v. Ventress*, 14 La. Ann. 267; *Latchford v. Starns*, 16 id. 252; *Kohler v. Smith*, 2 Cal. 597; *Pridgen v. Andrews*, 7 Texas,

461 : *Hopkins v. Crittenden*, 10 id. 189 ; *Chinn v. Hamilton*, Hempst. C. C. 438 ; *Keene v. Keene*, 3 Com. Bench, 144 ; *Gibbs v. Freemont*, 9 Exch. 25. Whether the interest provided for is to be regarded as a penalty depends upon the intention of the parties as gathered from the instrument itself. *Dakin v. Williams*, 17 Wend. 447, 454.

2. The validity of the contract cannot be impaired in respect to any of its terms, by the act of 1873. Const. of U. S., art. 1, § 10 ; *Barlow v. Gregory*, 31 Conn. 261, 265 ; *Ogden v. Saunders*, 12 Wheat. 213, 261 ; *Bronson v. Kinzie*, 1 How. 311, 316 ; *Ohio Life & Trust Co. v. Debolt*, 16 id. 432 ; *Gelpcke v. City of Dubuque*, 1 Wall. 206 ; *Van Hoffman v. City of Quincy*, 4 id. 553 ; *Walker v. Whitehead*, 16 id. 314, 317.

H. C. Robinson and *Mc Cloud*, for defendant. 1. The interest provided for by the contract after maturity was intended merely as damages or a penalty for breach of the contract. *Henry v. Thompson*, 1 Ala. 209 ; *Gray v. Crosby*, 18 Johns. 219, 226 ; *Orr v. Churchill*, 1 H. Bla. 232 ; *Sedgw. on Dam.* 420 ; *Brewster v. Wakefield*, 22 How. 118.

2. But whatever were the intentions of the parties, the act of 1873 controlled the matter of the damages to be recovered. These damages pertain merely to the remedy, and that is always subject to the control of the legislature. Such legislation, though retrospective, is yet held to be valid, where its object is "to remedy a mischief and promote justice." *Goshen v. Stonington*, 4 Conn. 221 ; *Welch v. Wadsworth*, 30 id. 155 ; *Guild v. Rogers*, 8 Barb. 502 ; *Van Rensselaer v. Snyder*, 13 N. Y. 29 ; *Conkey v. Hart*, 14 id. 22 ; *Walter v. Penry*, 2 Vt. 145.

LOOMIS, J. The act of July 2d, 1872, provides that, "where there is no agreement for a different rate of interest," the principal debt becomes due. There are, on the contrary, many cases where it has been decided that interest commences only when the debt becomes due and payable.

While this act was in full force the plaintiff loaned the defendant five hundred dollars, and took his promissory note for that sum, dated September 2d, 1872, payable one year after date, "with taxes, and interest at the rate of fifteen per cent after maturity." And the question is, whether this was a "contract for the payment and receipt of any rate of interest" within the meaning of the statute.

It is evident that the parties contemplated that the defendant would probably want to keep the money loaned after the expiration of the year, and therefore agreed specifically upon a rate of interest after maturity, and also for the payment of the taxes on the money after that time. It seems too clear for doubt that the minds of the parties met, and

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that they agreed on a rate of interest after maturity, and that it is a valid contract, so far as the mutual act and intent of the parties could give it validity. Is there any rule of law which defeats the intention of the parties or puts them under a disability to contract in this matter? And here we meet the precise legal question in this case: May there be a valid contract for interest after the time of the maturity of a note until payment?

Why not? If we may take the language of the statute in its common acceptation, no one would entertain a doubt that the parties could contract for a rate of interest after the money is due and while it remains unpaid, as well as before. There is no exception, qualification or limitation in the statute. If no rate of interest is specified, six per cent is the legal rate; but if the parties agree upon the rate in writing, then the agreed rate becomes the legal rate in that case.

There is nothing in the nature of the transaction, nor in the customary mode of loaning money, that makes it unreasonable or unjust to allow parties to contract for a rate of interest after maturity as well as before, but rather the contrary is true.

With the exception of loans made by regular banks of discount, it is quite common for the parties to specify an earlier day than is really intended for payment. The immense sums of money loaned by the savings banks, insurance companies, and the school fund of this State, are all evidenced by notes, bonds or other instruments on demand, or on very short time, and yet these are called permanent loans. It would strike most commercial and business men with surprise, if they were told that all that is received or paid for the use of the money so loaned was not interest, but mere damages for the breach of contract, and that the parties could not, if they would, make it interest, even by an express agreement to that effect.

If then there is any limitation of the power of parties to contract in this regard, it must be found in some extremely technical definition of the word "interest" as used in the statute. And the defendant's claim is that the word "interest" in law necessarily imports a compensation for the use of money until the principal is due. This claim, however, is not well sustained by authorities.

Bouvier, in his Law Dictionary, says: "Interest is the compensation which is paid by the borrower of money to the lender for its use, and generally, by a debtor to his creditor in recompense for his detention of the debt." Webster's Dictionary defines it: "Premium paid for the use of money; the profit per cent derived from money lent, or property used by another person. or from debts remaining unpaid."

The term "interest," as used in the statute, should be construed with reference to the fact that the legislature, in the act referred to, were not dealing specially with promissory notes having a fixed time to run and a definite obligation to pay at maturity; but on the contrary they had in view all sorts of debts, accounts, obligations and contracts, whether verbal or written, whereon interest might be computed, allowed, or reserved. Of course the word "interest" when used in the statute with reference to the "legal rate," in the absence of an agreement, means just the same as when it is used in connection with an "agreed rate."

Instead of its being true that the word "interest" has such a restricted signification that it must cease to be interest when the principal debt becomes due, there are, on the contrary, many cases where it has been decided that interest commences only when the debt becomes due and payable.

In *Selleck v. French*, 1 Conn. 32, a leading case on the subject of interest, Judge SWIFT, in giving the opinion, specifies nine classes of cases where interest will be allowed by law, and among them are the following:

"Where goods are sold and delivered to be paid for on a day certain, and are charged on book, interest will be allowed after the time of credit has expired."

"Where one has received money for the use of another, and it was his duty to pay it over, interest is recoverable for the time of the delay."

"Where an account has been liquidated, and the balance ascertained by the parties, interest will be allowed thereon."

So "interest may be recovered upon the arrears of interest due, if there is an express promise to pay such interest. *Rose v. Bridgeport*, 17 Conn. 243, and cases cited by Judge CHURCH, in the opinion, p. 247.

In these cases it is called interest and not damages. But there are cases where interest is allowed "by way of," or "in the nature of" damages.

In *Selleck v. French*, Judge SWIFT says: "Interest by our law is allowed on the ground of some contract, express or implied, to pay it, or as damages for a breach of some contract or the violation of some duty." He then proceeds to give a summary of the law on this subject in nine distinct propositions, the first and third of which are as follows:

"1. Interest will be allowed *in all cases* where there is an *express contract* to pay it."

"3. Where there is a written contract to pay money or other thing on a day certain, and the contract is broken, then interest is allowed by way of damages for the breach, as in the case of notes and bills of exchange."

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It is obvious that this last proposition refers to cases where the written contract is silent as to interest after maturity, for it had just been stated without qualification that interest is allowed in *all cases of express contract to pay it*. In no other way can the two propositions stand together.

This rule of allowing interest as damages originated in the desire of the courts to adhere to certain technical rules, and at the same time do justice to the parties. Interest could only be allowed on the ground of an express or an implied contract to pay it. In case therefore of an express written contract covering the subject-matter, but which was silent as to interest, the express contract could not be enlarged by adding a promise to pay interest, and there was no ground or right to imply such a promise. But as it was extremely unjust to allow the defendant to have the use of the money loaned without compensation, interest was allowed, in the nature of damages, for the detention of the money.

But it is a perversion or misapplication of this principle to apply it to an express written promise to pay interest after maturity. If there is any distinction which can be established by legal authorities it is the one upon which we base our decision in this case, that where, in a bill or note, interest after maturity is expressly reserved, it is treated as interest *eo nomine*, and never as damages.

In Byles on Bills (4th Am. and 6th London ed.) side page 240, it is said: "Interest where *not made payable on the face of the instrument*, is in the nature of damages for the retention of the principal." And in a note it is added: "But in an action of debt, if the interest be payable by the terms of the instrument, it is recoverable not as damages but as debt." Referring to *Watkins v. Morgan*, 6 Car. & Payne, 661; *Hudson v. Tossell*, 13 Law Journal, 141, and other cases.

This distinction would seem to be very well settled in England, and it is very clearly exhibited in a recent case, decided in 1874, in the House of Lords (*Cook v. Fowler*, Law Reports, 7 H. L. Cas. 27), which was a suit brought on a warrant of attorney given to secure the payment of £1,330, "on the 2d of June next," with interest at five per cent per month, "judgment to be entered up forthwith."

The Lord Chancellor (Lord CAIRNS) says of this warrant of attorney, that it was given to secure a debt of £1,330, with interest up to a certain day, and without any mention of subsequent interest upon the face of the instrument, plainly implying that if there had been any mention of subsequent interest it would govern. He says further: "No doubt, *prima facie*, the rate of interest stipulated for up to the time certain might be taken, and generally would be taken, as the measure of interest, but this would not be conclusive. It would be for the tribunal to look

at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of damages." The House of Lords declined to award damages at the rate of sixty per cent, because under the circumstances it was highly inequitable. Lord CHELMSFORD, in the same case, alluding to the argument of counsel that interest was to be implied after maturity at the same rate as stipulated for up to that day, said: "On the contrary, the distinction seems to be well established between cases where the *interest is expressly reserved in the instrument, and where it is not*. In the latter case it is recoverable, not as interest *according to the contract*, but as damages for the breach of it." Lord HATHERLEY said: "The question resolves itself simply into this: Is there, or is there not, *any contract after the day* upon which judgment was to be entered up for the payment of any specific sum and interest." Lord SELBORNE said: "Unless it can be laid down as a general rule of law, that upon a contract for the payment of money borrowed for a fixed period, on a day certain, with interest at a certain rate down to that day, a further contract for the continuance of the same rate of interest after that day, until actual payment, is to be implied, the decision of the Vice-Chancellor in this case is not erroneous. I entirely agree with those of your lordships who have preceded me, that no such contract is to be implied, unless there is something to justify it upon the construction of the words of the particular instrument."

In *Florence v. Jennings*, 2 Com. Bench (N. S.), 454, the plaintiff discounted for the defendant a bill for £250, drawn by the latter upon one A., and at the same time the defendant and A. signed the following memorandum, addressed to the plaintiff: "Sir—In consideration of your discounting the under-mentioned bill, we do hereby jointly and severally undertake, if the same is not wholly paid at maturity, to pay as interest thereon £20 for each month which shall have elapsed after maturity of the said bill, and until the same is wholly paid and satisfied." At the foot of this memorandum was written "£250, Jennings on A. at three months." In an action brought upon this collateral agreement, this high rate of interest, equal to ninety-six per cent, was recovered from the maturity of the bill, COCKBURN, C. J., delivering the opinion. This was about the year 1857, when the statute in England made five per cent the legal rate to be recovered, "unless it should appear to the court that a different rate of interest was agreed between the parties;" a statute similar in substance to our act of 1872.

The views we entertain will also be found to accord with nearly all the decisions in this country, both in the State courts and in the courts of the United States. A few of these we will cite.

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In *Wilkerson v. Daniels*, 1 Greene (Iowa), 179, under a statute of that State authorizing parties to contract for interest not exceeding twenty per cent per annum, a note was made "with twelve per cent interest, and if not paid to the day, fifteen per cent from date." The case was tried in a court of equity. HASTING, C. J., in giving the opinion, said: "The statute in force at the date of the execution of note regulating interest, permitted parties to contract for the payment of interest at the rate of twenty per centum per annum. The makers of this note agreed to pay twelve per centum from date, and if not paid to the day, fifteen per cent. This cannot be construed as a penalty against which a court of equity will afford relief. It is a contract to pay fifteen per cent interest per annum on a contingency, which we think the law then permitted."

In *Gray v. Briscoe*, 6 Bush (Ky.), 687, which was an action on a note payable one day after date "with ten per cent interest from date," it was argued in behalf of the defendant that the contract imported only an agreement to pay interest at that rate for one day, and that after the maturity of the debt it bore only the legal rate. But the court, while recognizing the rule of *Brewster v. Wakefield*, 22 How. 118, as correct "in cases where it appears that the parties meant to fix the rate of interest with reference to the time of maturity, and not of payment," say that "the case must be controlled by the intrinsic evidence which the contract itself furnishes of the intention of the parties. The amount of interest secured by the contract in excess of the rate of six per cent per annum for a single day is so inconsiderable that it is scarcely reasonable to suppose the parties intended to restrict the stipulated rate of interest to the maturity of the contract, but we must conclude that they intended it to continue until the debt should be paid."

In *Wernway v. Mothershead*, 3 Blackf. (Ind.) 401, the note was as follows: "Eight weeks from date we will pay Mothershead and Foster four hundred and thirty-two dollars, and if not paid when due we will pay five dollars interest per week until paid." The court held that this note, on default of payment when due, drew interest at the rate specified in the note from the time it became due. To the same effect also are the cases of *Billingsley v. Cahoon*, 7 Ind. 184, and *Kilgore v. Powers*, 5 Blackf. 22.

In *Parvin v. Hoopes*, Morris (Iowa), 294, the note read, "with ten per cent interest if not paid when due," and the court allowed interest at that rate to the date of the judgment.

In *Weems v. Ventress*, 14 La. Ann. 267, the notes read, "with interest from and after maturity at the rate of eight per cent per annum,

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until paid," and the court held that by contract as well as by law the interest began to run from the day of payment without allowing for days of grace. And this decision was re-affirmed in *Letchford v. Starns*, 16 La. Ann. 252.

In *Wiswell v. Baxter*, 20 Wis. 680, the note was payable on a day certain "with interest at thirty per cent per annum until paid," and the court allowed interest at that rate to the date of the decree.

In *Pitzer v. Barrett*, 34 Miss. 84, the note was payable September 1st, 1858, "with interest thereon till paid," and interest was allowed from date on the ground of contract. See also *Prigden v. Andrews*, 7 Tex. 461; *Hopkins v. Crittenden*, 10 id. 189; *Kohler v. Smith*, 2 Cal. 597.

In *Daggett v. Pratt*, 15 Mass. 177, action was brought upon four promissory notes, payable at distant days; three of them "with interest at three per cent per annum, if paid at their maturity, if not, six per cent interest to be paid;" and the fourth was payable without interest "until the note is out, if not paid then, lawful interest until paid." The notes not having been paid when due, judgment was rendered upon them all with interest at six per cent from the date of the notes to the rendition of final judgment. The error assigned was the amount of damages. The plaintiff in error claimed that the true construction of the promise was that interest was to be allowed at six per cent until maturity. But the court were of a different opinion, and affirmed the judgment. The case was decided as early as 1818, but the courts of Massachusetts still adhere to the principle of that case.

In the recent case of *Brannon v. Hursell*, 112 Mass. 63, decided in 1873, an action was brought on a promissory note for \$1,500, dated March 14th, 1870, payable four months after date with interest at ten per cent. The court below allowed interest at that rate to the time of verdict. The defendant took exceptions, and the Supreme Court overruled them. MORTON, J., in giving the opinion, says: "The rate of interest specified in the note is ten per cent, and the plaintiff claims interest at that rate since the maturity of the note. We are of opinion that he is entitled to receive it. The legal rate of interest is six per cent in the absence of any agreement for a different rate; but it is lawful for the parties to contract to pay and receive a different rate; and where the agreement to pay a greater rate is in writing it can be recovered by action. Statutes 1867, chap. 56. In the case at bar, the defendants have agreed in writing that the rate of interest for the use of the plaintiff's money shall be ten per cent. The plaintiff recovers interest both before and after the note matures, by virtue of the contract, as an incident or part of the debt, and is entitled to the rate fixed by the contract."

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To the same effect is the recent case of *Monnett v. Sturges*, 25 Ohio St. Opposed to these numerous and repeated decisions only one authority has been found sustaining all the positions of the defendant. We refer to *Henry v. Thompson*, and other cases considered at the same time, reported in 1 Ala. 209. And the force of this authority will be much impaired by a careful examination of the case and the peculiar grounds on which the decision is placed by some of the judges. There were a large number of notes differing in their terms, no particular description of which is found in the report; but they are reduced to four general classes in the briefs of counsel: "1st. To pay the principal at a future day, and if not punctually paid, to pay the premium or interest as at the rate expressed from the date. 2d. To pay the principal at a future day with interest at the rate expressed from the date till paid. 3d. To pay the principal at a future day with a distinct agreement to pay the interest, not stating the time from which or till which it was to run. 4th. To pay the principal at a future day, with interest from the maturity of the note." The rates of interest stipulated for were in some cases one hundred and twenty per cent per annum; in others sixty per cent, and the very lowest was thirty per cent. The statute of that State then in force provided "that any rate of interest or premium for the loan or use of money, wares, merchandise or other commodity, fairly and *bona fide* stipulated and agreed upon by the parties to such contract, expressed in writing and signed by the party to be charged therewith, shall be legal." A majority of the judges concurred in refusing to allow the stipulated rates of interest, but they did not agree as to the grounds of the decision. Judges CRENSHAW and MINOR delivered very able dissenting opinions sustaining the stipulations for interest as valid contracts. The majority opinions were given by the Chief Justice, and by Judge SAFFORD. Judges ELLIS and GAYLE concurred with the Chief Justice in the opinion that the statute required that the contract on its face should show that the consideration was a loan. One reason for giving such a literal application of the statute is stated to be the unparalleled rate of interest. But in the course of the opinion the Chief Justice says: "As to the second, third, and fourth classes of cases, as arranged in the brief and arguments of counsel, I am of opinion that if the consideration had been a fair and *bona fide* loan, the parties had a right to stipulate any rate of interest, without limiting it to a future day or to the maturity of the note, provided the contract as to interest be absolute and unconditional."

Judge SAFFORD held (in which GAYLE, J., also concurred), "that where the rates of interest were exorbitant, and there was no time of forbearance fixed by the contract, they were not within the statute;" and this

opinion also comments on "the enormity of the rate as inducing a presumption of unfairness, and as exceeding any rational estimate of a fair equivalent for the use of money, and greatly beyond any rate ever sanctioned by the principles of the common law." It seems quite obvious that the enormity of the rates of interest specified in these notes controlled the decision and induced the court to construe the stipulations for interest as a penalty, or as not within the literal meaning of the statute.

If, in the case now under consideration, the rate of interest was as high as one hundred and twenty per cent, and if the form of the note was like some of the notes in the case last cited, which specified a day for the payment of the principal, and then provided, "if not paid punctually at the day," then to pay this high rate of interest from date, it might possibly justify the court in holding that what the parties called interest, they meant simply for a penalty. But the contract we are called upon to construe specifies a rate of interest not much, if any, above what has often, during periods of monetary stringency, been considered a fair equivalent for the use of money at the place where this contract was to be performed.

The precise question we are considering has never been before this court in any previous case; but decisions have been made looking we think toward the result reached by the majority in this case. See *Rose v. Phillips*, 33 Conn. 570, and the cases hereafter mentioned.

Where the contract specifies a rate higher than the legal rate up to the time of maturity, but is silent as to the rate to be charged after maturity until payment, there have been diverse decisions in different States; some holding that the rate fixed by the terms of the contract shall govern for the time after the breach, and others that the rate fixed by law shall then prevail.

Our Supreme Court, in the cases of *Beckwith v. Hartford, Prov. & Fishkill R. R. Co.*, 29 Conn. 419, and *Adams v. Way*, 33 Conn. 419, has taken position firmly with the former class. It is true that it is held that the plaintiffs in these cases were entitled to interest as damages, estimated by the contract before maturity and not by the legal rate; but if the court could give such effect to an agreed rate, referring only to the time prior to maturity, as to supersede the legal rate after maturity, it would seem quite natural, if not inevitable, that the same court would sanction an express contract to pay an agreed rate after maturity, when the statute at the time allowed parties to contract for any rate without any qualification or exception.

We are reminded that when the decisions just referred to were made by this court the legislature had not attempted by any special act

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to control the rate of interest or damages after maturity. But on the 11th of July, 1873, an act was passed which provided "that in all suits in law or equity now pending, or which may hereafter be brought, for the recovery of moneys loaned, no greater rate of interest than seven per cent per annum shall be recovered or allowed for the time after the money loaned becomes due." How then does this statute affect the question we are considering?

Our reasoning has already conducted us to the definite conclusion that the contract in the case at bar was, when made, a valid contract for interest after maturity of the note. If, then, the act just cited must be construed as applying to such contracts, then, so far, we must hold it null and void, as being within the provisions of section 10, of article 1, of the Constitution of the United States, which prohibits a State from passing any "law impairing the obligation of contracts." But we are reluctant to declare any act of the legislature utterly futile and nugatory; and upon careful examination of this act we do not think it is necessary to hold that it was intended to affect existing contracts for interest after maturity, but that the object was to prevent the operation of the rule established by this court in the cases last cited, that the rate of interest agreed upon before maturity should govern the rate to be allowed as damages after maturity where the contract was silent as to the rate after maturity. This construction will seem the more reasonable if we would harmonize the act in question with that of July 1st, 1873, which made seven per cent the legal rate, but expressly provided that the act should not affect existing contracts. It is hardly supposable that the legislature on the 1st of July intended to save all existing contracts, and that on the 11th of the same month they intended to destroy them. And as further evidence of the intention of the act we find that the legislature at its next session adopted the "Revision of the Statutes" to take effect January 1, 1875, and that in such revision the operation of the statute in question was confined to "*damages* for the detention of money after it becomes payable;" adopting almost the identical phrase used in the cases cited. Gen. Statutes, Revision of 1875, p. 351, § 2.

This act thus construed has still a large field for its operation, though it is restrained to those cases where the instrument in which the parties have embodied their contract is silent as to the rate of interest after maturity, for such contracts are by far the most numerous.

There is manifest error in the judgment complained of, and it is reversed and the cause remanded.

IL this opinion FOSTER and PARDEE, JJ., concurred.

CARPENTER, J. (dissenting). I cannot concur in the result to which a majority of the court have come. The note fell due September 2d, 1873. After that day the defendant did not hold the money under and by virtue of his contract, but rather in violation of his contract. Compensation for the use of money so detained is not, in any proper sense, interest. Although it is called interest in the note, and in the statute hereinafter quoted, yet that does not change its nature. The word is used in a loose and popular sense. By whatever name it may be called, it is in substance damages for a breach of the contract. *Fisher v. Bidwell*, 27 Conn. 363. The agreement in the body of the note, "and interest at the rate of fifteen per cent after maturity," is nothing less than an attempt to fix the amount of such damages. That agreement could have no effect until on and after September 2d, 1873. The statute which was then in force (approved July 11th, 1873), declares that "no greater rate of interest than seven per cent per annum shall be recovered or allowed for the time after the money loaned becomes due." The agreement and the statute palpably conflict, and one or the other must give way. As the agreement relates to the penalty for a violation of the contract, which pertains to the remedy and is always subject to legislative control, I think the statute and not the agreement, should prevail.

In this opinion PARK, C. J., concurred.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

FAIN v. INMAN.

(6 Heisk. 5.)

Equitable lien — when specific lien prior to.

The equitable lien of the vendor of land, for the unpaid purchase-money, is subordinate to a specific lien acquired by a creditor of the vendee, whether with or without notice, before proceedings are instituted to enforce such equitable lien.

BILL by W. D. Fain against S. W. Inman and others, to enforce an equitable lien for the purchase-money of land. The opinion states the facts. A demurrer to the bill was sustained below and complainant took error to this court.

J. R. Cocke, for complainant.

R. McFarland, for defendant.

SNEED, J. The controversy is between the vendor of land who has sold and conveyed without an express reservation of the lien, and who seeks by this bill to assert his lien for purchase-money unpaid, and the purchaser at a trust sale, under the trust deed of the vendee, made and foreclosed before the filing of the bill. The complainant bargained and sold the land by title bond on the 7th of February, 1854, and on the 9th of January, 1856, conveyed the land by deed, reciting the payment of \$1,200, the full price and consideration. when, as a matter of fact, the sum of \$177.05

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was still due and unpaid as part of the purchase-money. The indebtedness was evidenced by a note under seal, due at one day, and dated the 7th of February, 1854.

The complainant brings his bill to charge the land with the payment of this sum, and his vendee and the purchaser, under the vendee's trust sale, are made parties defendant. It appears from the bill that the complainant's deed of conveyance to the vendee was duly registered on the 23d of January, 1856, and that said vendee being indebted in the sum of \$1,223.50 to the defendant, Inman, did on the 12th of December, 1861, convey the land in trust to secure said debt; that the trustee sold the land on the 2d of November, 1868, and that the defendant, Inman, became the purchaser at the sum of \$500, and afterward advanced his bid to the sum of \$1,757.61, the amount of his debt at the time of the sale. The bill was filed on the 16th of December next thereafter. It charges that the complainant's vendee was then in possession of the land; that he had always recognized the complainant's lien for the balance of the purchase-money unpaid, and that at the time of the execution of said deed of trust the said defendant, Inman, had full information and knowledge that all of the purchase-money had not been paid, but that since said trust sale and purchase the said defendant, Inman, claimed said land as unincumbered by complainant's lien. There was a demurrer to the bill which was allowed by the Chancellor, and the bill was dismissed. The complainant brings the cause into this court by writ of error.

The question mainly pressed in argument here is, whether the vendor of land who has without reservation conveyed the legal title, has a specific lien for unpaid purchase-money, by virtue of the naked relation of vendor and vendee, without more, or a mere equity or right to create a specific lien by taking the lawful and appropriate steps to enforce it. The solution of this question, not a new one in this court, must determine the equities of these parties. It is a well-recognized doctrine of our law that the vendor of land who only conveys by title bond reserves a specific lien, the creation of a court of equity, upon the land for the unpaid purchase-money; for in this case the legal title is in him, and only the equitable title in the vendee, who may perfect it into a legal one by the payment of the price. The vendor's interest in the land is in such case but an unwritten mortgage, an equitable trust that attaches to the land, which, though originally the creation of a court of equity, has come now to be a statutory right. *Vide* Code of Tennessee, §§ 3563, 3564. It is a well-established doctrine of a court of equity also, that the vendor who has conveyed the title may come into a court of equity and have a decree

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for the sale of the land to discharge the price, or any part thereof which may yet be due to him. And this is so as against the vendee or his heirs, or volunteers, or purchasers under him, who took the land with full notice of the price unpaid.

The complainant in this case had parted with the legal title, and the public had been advised of its transfer to the vendee by the registration of the deed. The vendee had built a credit upon it, and had contracted a debt perhaps upon the faith of it to an amount exceeding the original price of the land. The creditor, it is admitted by the demurrer, was informed of the fact that a balance of the purchase-money had been many years due and was unpaid. To secure and indemnify himself he accepts the security of a conveyance of the land in trust for his benefit, thereby acquiring for himself a specific lien, and actually becomes the purchaser of the land at the full amount of his debt, and holds and claims under his purchase before the original vendor has taken the first necessary step to assert his equity in the land. Without reference to the doctrines of the law which must determine this controversy, and looking alone to the *status* of these parties and the history of these transactions, it would not be an ungracious or difficult task in a court of equity to adjust the rights of these parties. And a case could not be easily conceived which so well illustrates the value and wisdom of the principles which govern this case.

It may be observed that the doctrine that the vendor of land who has parted with the title may charge the land with unpaid purchase-money even as against creditors, is not of universal acceptance in this country. A secret trust, which is at once the mantle and the indication of fraud, is not, and should not be, a favorite in the law. If there be some special magic in a mere obligation to pay money for land where the vendor has divested himself of the title—which creates an equity in behalf of the vendor against the land itself—there can surely no sound reason be given why this equity should overreach all others, though founded in equal justice, and originating, perhaps, in the very faith and credit which property in the land has imparted to the vendee.

It would seem on the other hand, to be the sounder principle that in a race of diligence *that* equity is to be preferred which first asserts itself.

We cannot too highly commend some observations upon this subject by Chief Justice MARSHALL. To the world, says the Chief Justice, the vendee appears to hold the estate divested of every trust whatever; the credit is given to him in the confidence that the property is his own in equity as well as at law. A vendor relying upon this lien ought to

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reduce it to a mortgage so as to give notice of it to the world. If he does not, he is, in some degree, accessory to the fraud committed on the public by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien. It would seem inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien should be set up in a court of chancery to the exclusion of *bona fide* creditors. The lien of a vendor, if in the nature of a trust, is a secret trust: and although to be preferred to any other subsequent equal equity unconnected with a legal advantage, or equitable advantage, which gives a superior claim to the legal estate, will be postponed to a subsequent equal equity with such advantage: *Bayley v. Greanleaf*, 7 Wheat. 46. Of this case Judge CATRON said, in *Gann v. Chester*, 5 Yerg. 205: "This decision meets the most decided and unanimous approbation of this court.

This character of lien is rejected entirely by the courts of North Carolina, and even during the early period while it was recognized there, it was held subordinate to the rights of judgment creditors and purchasers at their sale. 1 Dev. & Batt. 32. "If a vendor claiming such a lien," said Judge GASTON, "will not reduce it to a legal form, and give it the notoriety of registration which our laws require for the validity of legal liens, it cannot prevail against creditors." *Ib.* In Mississippi it has been held that it cannot prevail against creditors claiming under a deed of trust made for their benefit, or under a mortgage, for they have more than an equity or lien; they have the legal title. *Dunlap v. Barnett et al.*, 5 Sm. & Marsh. 702. And so in this State it is held that the lien will not be sustained against judgment creditors or purchasers at their sale. *Roberts v. Rose*, 2 Hum. 145. It has been correctly said that "the neglect of the courts to distinguish carefully between the implied equity where the title has been absolutely conveyed and the lien existing where the title is retained by the vendor and only a title bond has been given to the purchaser, has produced much confusion and conflict of opinion upon this subject. See *Anthony v. Smith*, 9 Hum. 508. We think the true doctrine is thus stated by a learned writer upon this subject: "It is not a lien until a bill has been filed to assert it; before that is done, it is a mere equity or capacity to acquire a lien and to have a satisfaction of it. When a bill is filed, it becomes a specific lien. In such cases the dispute is between the vendor on the one hand, and the vendee and his representatives on the other. But when subsequent lien creditors intervene the contest is no longer between the vendor and the vendee; it is between third persons contending for his estate. Lien creditors will supplant one, who, though he had a right in equity to charge the land

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through his own *laches* and default, failed to secure a lien. The principle is then," continued the learned author, "that the vendor's equity, though prevailing against the vendee and all claiming through him, is subordinate to the rights of subsequent lien creditors with or without notice. It then only remains to determine who are lien creditors. Judgment creditors, mortgagees with or without notice, creditors receiving a conveyance to themselves, of course are.

.. In the case of a voluntary assignment to a trustee for the benefit of creditors, the difficulty is to determine when the creditors become lien creditors by the assignment. They must in some way have elected to take under the deed. Thus if the creditors have filed a bill to have the trust under the assignment executed, or have otherwise made themselves parties to the assignment by claiming or receiving a benefit under it, they would prevail over the tardy claim of the vendor." 1 Lead. Cas. Eq. 384; *Trotter v. Erwin*, 27 Miss. 772; *Gilman v. Brown*, per STORY, J., 1 Mason, 102. This court, in two well-considered opinions, have followed this doctrine. It has been suggested at the bar that the opinion of the court to this effect in the case of *Green v. Demoss*, 10 Hum. 371, was a mere *dictum* of the judge delivering it; but we apprehend it will be seen that this precise question was involved in that case, as well as in that of *Ellis, ex'r, v. Temple*, 4 Col. 315, subsequently decided. It is true that in the first-named case the trustee in his answer insists that he occupies the position of a *bona fide* purchaser of the land for a valuable consideration and without notice of the complainant's equity. But it seems that the case was heard on its merits by the chancellor, and a decree rendered in favor of complainants. This court reversed that decree and dismissed the bill. The learned judge says: "In answer to the second question raised in the case, we think it clear upon principle and weight of authority, that although the equity of the vendor will be sustained against the vendee, and all claiming through or in privity with him, and likewise against volunteers and purchasers with notice, yet it cannot be allowed to prevail against creditors of the vendee who have subsequently acquired a lien upon the estate, whether *with or without notice*, either by judgment or in any other mode, before a bill has been filed by the vendor to assert his lien. The equity, though it relates to the date of the conveyance, does not acquire the character or effect of a specific lien upon the property until the filing of a bill to enforce it. Hence, as between the vendor and subsequent lien creditors of the vendee, it becomes essentially a question of priority of lien, irrespective of notice and all other considerations." *Green v. Demoss*, 10 Hum. 374. And to this effect is the case of *Ellis, ex'r, v. Temple*, 4 Col. 319.

The case of *Brown v. Vanlier*, 7 Hum. 239, relied upon by the counsel for complainant, does not sustain him as applied to the case now before us. That case was argued by one of the members of this court. The only question involved was, whether a vendor of land, when the purchase-money has not been paid, can enforce his lien therefor against a trustee and *cestui que trust* when the land has been conveyed to secure debts, when the bill is filed for that purpose before the trust is executed? And this question was decided affirmatively, and we think rather gives strength to the theory of this opinion, that the vendor's right in such case is a mere equity — that other equities of equal dignity may attach upon the land which may or may not overreach it — depending alone upon the result of the race of diligence which is open to all the parties. It will be observed in that case, that the argument of one of the eminent counsel for the complainant was adopted in *totidem verbis* as the opinion of the court. It will be seen that the argument admits that to give efficacy to this equity of the vendor as against creditors under a trust conveyance, the vendor must file his bill before any steps have been taken to close the trust conveyance; and that the counsel calls special attention to his distinct concession in argument, that "if the conveyance for the benefit of creditors is closed before the vendor endeavors to enforce his equity, or even if the first step in a legal forum is taken by the creditors, such creditors might obtain a priority, *although notified of the existence of the vendor's lien*;" and he concludes that the vendor in that case, having filed his bill to enforce his lien before any steps were taken under the trust conveyance, by his diligence acquired that priority which at common law would have been given to his lien. Id. 248.

We need not pursue this subject further. It is clear that creditors who have acquired a valid, specific lien upon the estate are not to be assimilated to volunteers and purchasers under the vendee in the sense of the law; and if this floating equity, misnamed in judicial parlance "the vendor's lien," be not quite a myth, but a mere capacity in the vendor to acquire a lien if he chooses, then this same capacity belongs to others, who, as creditors, have rights just as meritorious as his. And we hold that the simple knowledge on the part of a creditor, that the vendor, sleeping from year to year upon his rights, may, if he chooses, acquire a lien, as the creditor himself is about to do, cannot even in a forum of conscience impair the value or affect the validity of that lien so acquired by the creditor. In such case there is no *mala fides* — no fraud — no improper advantage taken by the one of the other; but the race of diligence as just creditors being open to both alike, the one has lost and the other won.

Let the decree be affirmed and the bill dismissed.

Decree affirmed.

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WEBSTER v. ROSE.

(6 Heisk. 93.)

Constitutional law — stay law invalid.

An act passed by the legislature of Tennessee staying judgments and decrees rendered in the courts of that State for twelve months *held* to be in contravention of the provision of the Federal Constitution prohibiting State laws impairing the obligation of a contract and void as to previously existing contracts.

ACTION of debt by Reuben Rose against Webster. The judgment was in favor of plaintiff below, and Webster appealed by writ of error with a co-plaintiff Mann as surety. The facts appear in the opinion.

D. M. Key, for plaintiff in error.

James T. Shields, for defendant in error.

FREEMAN, J. This is an action of debt, and presents the single question of the constitutionality of the act of the legislature of the 26th of January, 1861, providing for a stay of all judgments and decrees had in any of the courts of record in this State, and before justices of the peace. The section of the act necessary to be quoted is as follows :

“ *Be it enacted, etc.,* That from and after the passage of this act all judgments and decrees which shall be rendered in any of the courts of this State, or which shall be rendered by justices of the peace of this State for money, shall be stayed by such courts and justices for the period of twelve months from the rendition of such decree or judgment ; provided, that the defendant or defendants in said judgment or decree shall appear before said courts of record during the term of said courts, or within two days after the rendition of the judgment before justices of the peace, and give good and ample security for the stay of execution, to be approved of by said courts or justices : which stay shall operate as a judgment against the security of said courts or before said justices.”

The question is, does this act impair the obligation of contracts made before its passage, and such stay be given in cases of judgments or decrees rendered on such contracts?

We would, if possible, avoid the discussion of this question, which has been exhausted by the exposition of Marshall and a host of other judicial minds in this country, and upon which we feel we can throw no additional light by any thing which we may say in this opinion. But it happens to

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be the only question presented in the case before us, and our predecessors have held opinions and made decisions, as we know, the one precisely the opposite of the other, upon the very statute under consideration. We allude to the decision made by the Supreme Court at Jackson, in April, 1861, opinion by Judge MCKINNEY, which is not reported, and the decision made by our immediate predecessors, September Term, 1865, opinion by MAYNARD, Special Judge, in the case of *Farnsworth & Reeves v. Vance & Fleming*, reported in 2 Col. 108. In the first opinion, after thorough argument of the question, the statute was held to be unconstitutional and void; and in the last it is held to be constitutional and the law of the land. Which view of the question shall we follow and adopt as correct, is what we are called upon to say by the case now before us.

The familiar clause of the Constitution of the United States under which this question arises, is § 10 — or part of that section — art. I, and is as follows: "No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts," and our State Constitution, art I, § 20, is: "*That no retrospective law, or law impairing the obligation of contracts, shall be made.*"

In the language of Chief Justice MARSHALL, in the case of *Sturgis v. Crowninshield*, 4 Wheat. 197: "It would seem difficult to substitute words which are more intelligible, and less liable to misconstruction, than those which are to be explained." Yet there has not only been great diversity of judicial opinion as to the proper construction of this simple clause of the Constitution as to what it means, but still more as to its precise application. We will not, however, examine, or attempt to criticise, much less to analyze and evolve the true principle out of the vast number of cases in both State and Federal courts that have reviewed this question. We only present what we hold to be the sounder principle, with a few of the reasons in favor of that view. What then constitutes the *obligation* of a contract, in a legal sense, is the point on which the whole question turns. Whatever that is, cannot be impaired — is in plain language forbidden. We assume, first, that there are in every contract for payment of money — as this one is — two elements of obligation that are distinct and clearly separable; the one the moral obligation to perform what is promised; the other the legal obligation which grows out of such promise, and results from it when made. The first is an obligation growing out of the general duty of truthfulness and good faith in all our conduct, founded upon that which, perhaps more than all else, is the distinguishing feature between man and all other intelligent animated creatures — the possession of a moral nature or constitution; a principle, as part of his nature, which is made to respond to the demand

or idea represented by the words, "I ought;" that principle in the constitution of his nature which imposes upon him a moral compulsion, or mora' *obligement* — to use a word that expresses the idea more clearly — to do that which he has promised, or to do any other act which is included in that broad term "duty," and which is the only principle out of which that obligation can grow, or on which it can be based. This obligation is one not enforceable in courts of law, but alone in the forum of conscience. Its binding force can neither be created, nor enlarged, nor modified, by laws passed by a legislature, or any other power in a State; nor can it be released or broken, though it may be violated. It must remain eternally the same in its original and essential force. The framers of the Constitution did not intend to prohibit the States in this direction, or add additional strength to this element of the obligation, by protecting it from laws that might weaken its force. It must be the other element of obligation that is the *legal* compulsion or *obligement*, that grows out of a contract and makes a part of it, enters into it at the time it is made, that is intended to be protected and maintained in its full force and vigor by this language.

This is made certain by another view of the question, that the prohibition is against any State passing any law impairing the obligation of contracts. It is the action of law-making bodies that is thus restrained, and that of States. The law-making bodies of States, or law-enacting bodies, are the people in convention, or in legislative assemblies, and it is these bodies that are prohibited in the exercise of their functions to pass or enact laws, the one in the form of constitutional provisions, the other in the form of statutes, or legislative enactments in the direction forbidden. It would seem clear then that the prohibition being upon legislative or law-making bodies, that it should be referred to that which, without the prohibition, they were competent to do, and was within their legitimate sphere of action, that is, the impairing by law of an obligation created or imposed by law; or in other words, to effect injuriously the legal obligation or legal compulsion or *obligement* that makes a part of every contract.

This we think the principle that underlies the reasonings of the Supreme Court of the United States in the great leading cases on this subject of *Sturgis v. Crowninshield*, 4 Wheat., and of *Ogden v. Saunders*, 12 id. 132; for in the first case Chief Justice MARSHALL, in delivering the opinion of the court, says, p. 197: "A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract." That is, we add, it is the legal obligation

with which the law-making power and the courts have to deal. He adds: "Where a party has given his promissory note, by which he promises to pay a sum of money on a certain day, the contract binds him to pay that sum on that day, and this is its obligation. Any law which releases a part of this obligation must, in the literal sense of the word, impair it." Here in this last sentence the learned chief justice (with deference be it said) seems to fail to distinguish between the moral and the legal obligation; for while the party is certainly morally bound to perform it on that day, and while the law equally recognizes the duty, it does not actually, by any of its machinery, oblige him to do so on that day, nor is there any legal *obligement* or compulsion on him to do so, but only the right to bring a suit and have judgment in the future, and an execution to enforce the performance by sale of property for that purpose.

We assume that the convention had this principle and view of the case in their minds when they framed this clause; that they were thoroughly acquainted with our common law and knew its machinery for the enforcement of contracts, and meant that the legal obligation of contracts — that is, the legal means of enforcing them, which constituted their legal obligation, or the legal *obligement* by which they were enforced — should not be impaired or weakened, or rendered less effective than when the contract was entered into and the obligation imposed or taken upon the party: and such seems to be the basis of the reasoning of Judge WASHINGTON in delivering the majority opinion of the court in the case of *Ogden v. Saunders*, 12 Wheat. 259. He says: "It is then the municipal law of the State, whether that be written or unwritten, which is emphatically the law of the contract made within the State, and must govern it throughout, whenever its performance is sought to be enforced. It forms, in my opinion, a part of the contract, and travels with it wherever the parties to it may be found." THOMPSON, J., in his opinion, says: "As to what constitutes a contract no diversity of opinion exists. All the elementary writers on the subject, sanctioned by judicial decisions, consider it briefly and simply an agreement in which a competent party undertakes to do, or not to do, a particular thing; but all know that the agreement does not always, nay, seldom, if ever, upon its face specify the full extent of the terms and conditions of the contract; many things are necessarily implied and to be governed by some rule not contained in the agreement, and this rule can be no other than the existing law when the contract is made or to be executed. Take for example," he says, "the familiar case of an agreement to pay a certain sum of money with interest. The amount or rate of such interest is to be ascertained

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by some standard out of the agreement, and the law presumes the parties meant the common rate of interest established in the country where the contract was to be performed. This standard is not looked to for the purpose of removing any doubt or ambiguity arising on the contract itself, but to ascertain the extent of its obligation, or, suppose a law should declare generally, that all contracts for the payment of money should bear interest after the day of payment fixed in the contract, and a note, where such law was in force, should be made payable in a given number of days after date, such note would assuredly draw interest from the day it became payable, although the note on its face made no provision for interest, and the obligation of the contract to pay the interest would be as complete and binding as to pay the principal. But such would not be its operation without looking out of the instrument itself to the law which created the obligation to pay the interest. The same rule applies to contracts of every description." In another part of the opinion he quotes from a case in 1 Washington's Circuit Court R. 341, as follows: "Those laws which in any manner affect the contract, whether its construction, the mode of discharging it, or which control the obligation which the contract imposes, are essentially incorporated with the contract itself. The contract is a law which the parties impose upon themselves, subject, however, to the paramount law, the law of the country where the contract is made."

We will not further follow this line of investigation through the various cases in the Supreme Court of the United States. They are familiar to the profession, and, we may add, they present such perfect models of judicial reasoning, both in clearness and lucidity of style, and exhaustive and wide-reaching comprehensiveness of view, combined with such wonderful acuteness and powers of analysis, as to present some of the most attractive reading to the legal student to be found in the English tongue.

We turn for a moment to the decisions of our own courts, where the same views were at an early day adopted, and presented in an opinion of great ability in the case in Peck's Reports of *Townsend v. Townsend*. The court in that case hold the principle to be in substance: "That the legislature may alter remedies, but they must not, so far as regards antecedent contracts, be rendered less effective or more dilatory than those ordained by the law in being when the contract was made, if such end be the direct and special object of the legislature apparent in an act for the purpose." Hence an act to suspend execution for two years, unless the plaintiff will indorse therein that he will receive bank paper in discharge of his judgment, was held to be void, as repugnant to the clause of

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the Constitution now under consideration. Such was the uniform holding of our courts, until the case of *Farnsworth & Reeves v. Vance & Fleming*. That case goes on the principle, "that the legislature may, in their discretion, vary the nature and extent of the remedy so that always some substantive remedy in fact be left;" 2 Col. 117; but leaves out the important qualification that it shall be equally efficacious as the one in existence at the time of making the contract.

We think perhaps the true principle is more properly stated thus: that the legislature have complete control over the form of the remedy, the mode of proceeding by which the legal obligation is enforced; and in all that pertains to this may alter, change, or modify its laws as discretion may dictate. For instance, where the existent remedy at the time was debt, it may change it to *assumpsit*; or if *assumpsit*, may change it to debt; or, as in our Code, may give an action simply on the facts of the case; but then in no case can it by direct enactment for that purpose, nor even by indirection, where such is the purpose, render the remedy essentially less effective for enforcement of the obligation to which the party has bound himself by his agreement.

If the legislature can enlarge the time one day in which the party is to perform what the legal obligation of his contract requires at the time it is entered into, it may do it for a hundred days; and if for this period, then it may equally well do it for a hundred years. There can be no difference in principle in the one case from that of the other; and thus the legal obligation is not only impaired, but practically destroyed. Can this tremendous power be fairly held to lurk within the principle of legislative power over the remedy for enforcement of a contract. We think not.

We will not critically examine the opinion referred to in 2 Col., as it would be a useless consumption of time with no profit. The views on which it is based are well understood by the profession.

We cannot approve the reasoning or conclusions of that case, and overrule it, adopting what we think was the uniform current of judicial opinion in Tennessee before that case as the sounder rule. See cases referred to by Mr. Cooper in note to *Townsend v. Townsend*, Peck's R.

We have not attempted in this opinion a full discussion of the very interesting question before us, only desiring to present clearly the basis or some of the grounds on which we feel bound to overrule the opinion referred to, that it may be seen that it is not done without a full consideration of the question. We have not felt called on to go into an elaborate argument to vindicate the views which we maintain in this opinion.

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We affirm the judgment of his Honor the Circuit Judge, who held the law unconstitutional, and give judgment against the plaintiff and surety for his appeal for the costs of this court.

Judgment affirmed.

EAST TENNESSEE AND VIRGINIA RAILROAD COMPANY, plaintiff in error, v. ROGERS.

(6 Heisk. 148.)

Common carrier — liability for loss of goods by connecting carrier.

Where a common carrier received goods to be delivered at a point beyond its own line by a connecting carrier, *held*, that such common carrier was liable for a loss of the goods while in the hands of the connecting carrier in the absence of a contract exempting from such liability.

ACTION by Rogers and Hartsell against the East Tennessee and Virginia Railroad Company to recover for the loss of goods. The facts appear in the opinion. The judgment below was for plaintiffs, and defendant took appeal by writ of error.

J. H. & S. P. Gaut, for plaintiff in error.

John W. Ramsey, for defendants in error.

FREEMAN, J. This action was brought before a justice of the peace to recover for the value of a lot of dressed poultry shipped by Rogers and Hartsell, *via* East Tennessee, Virginia and Georgia Railroad, from Chattanooga, for which the company, by their agent, gave the following receipt: "Received of Rogers and Hartsell, for John F. Hagan, Atlanta, the following articles, to-wit: 1 barrel and one box of poultry, 239 lbs., to be forwarded by the East Tennessee and Georgia Railroad, subject to freight and the regulations of the company. Signed, Samuel Rose, Agent."

In the agreed case in the record it is admitted by the plaintiffs that the defendant shipped the poultry at the proper time, and turned the same over in reasonable time, to the officers and agents of Western and Atlantic road, at Dalton, and that Dalton is the terminus of the East Tennessee, Virginia and Georgia Railroad and that the

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Western and Atlantic road connects with it at Dalton, and extends to Atlanta, Georgia. It was further admitted that said box of poultry was detained by the agents of the Western and Atlantic road for thirteen days, and by this delay was spoiled and rendered valueless. It was further agreed, that when freight is shipped from the East Tennessee, Virginia and Georgia road to Atlanta, it is the usage and custom of the officers of the Western and Atlantic road to collect and settle the freight with the other road — that is, their *pro rata*. The property having been lost to the shipper by the neglect of duty on the part of the Western and Atlantic road, the question is as to the liability of the East Tennessee, Virginia and Georgia road for such loss, or how far one railroad can be held responsible for the negligence of another where the transportation is continuous and entire over their respective roads, under such a contract as the one in this case.

This is a question upon which the English courts, and many of our American courts, have adopted rules and made a series of decisions, the one distinctly opposite to the other. The English courts, with great unanimity, holding that the carrier giving the receipt and undertaking the carriage of goods from one point to another, is responsible for all the intermediate routes, unless he shall by express contract limit his liability to the transportation of the goods only to the end of his own road.

There has been diversity of opinion in the courts of the various States of the Union on this question, but it must be conceded that probably the weight of American authority is against the English rule. We have no distinct decision of this direct question in our State, though we think the principle has been adjudged in one case that would be conclusive of the question. We allude to the case of *Carter & Hough v. Peck*, 4 Sneed, 205. In that case the suit was brought to recover for breach of an alleged undertaking on the part of Carter & Hough to convey plaintiff and his family from Nashville to the city of Memphis. The defendants were the proprietors of a line of stages from Nashville to Waynesborough. Sims & Co. owned the line from that point to Lagrange, Tennessee, where it connected with the Memphis and Charleston Railroad to Memphis. By an arrangement between all the parties, it was agreed that passengers might pay the whole fare at either end of the line, and receive a through ticket, though it was not shown that plaintiff had any knowledge of this agreement — this knowledge, however, was treated by the court as unimportant. The plaintiff bought a ticket at Nashville for himself and wife to Memphis, but when he arrived at Waynesborough, Sims & Co. refused to take him on for several days; he was compelled to take another route and put to considerable expense and

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inconvenience. The court holds in that case, when the defendants sold plaintiff a ticket through from Nashville to Memphis, "they thereby became bound for his transportation on the entire line," and that the arrangement between the parties on the various lines of travel was a matter with which the plaintiff had nothing to do. He was no party to that agreement, nor was he bound to look to any person for performance of defendants' undertaking but themselves. The court further say: "If defendants when they sold plaintiff the tickets intended that he should risk the proprietors of the other portions of the line to carry him through, then they should have so stipulated and informed him of this arrangement, so that he might, with full knowledge of the facts, have elected whether he would pay the entire fare and take through tickets, or pay for that portion of the line of which they were the proprietors and make his own arrangements for the balance of the journey." A similar rule is stated in case of *E. T. and Ga. R. R. v. Nelson*, 1 Col. 276, where Judge WRIGHT says: "If the carrier or his servant, within the scope of his employment, enter into a special contract to deliver in any particular time or place, even beyond the terminus of his particular route, it will be binding."

These cases follow the principle of the English decisions, and we think lay down the sounder doctrine on the subject.

The leading case in England on this question is that of *Muschamp v. The Lancaster and Preston Junction Railroad Co.*, 8 Mees. & Welsby, 421, in which it was held by the Court of Exchequer, "that where a carrier receives goods directed to a place beyond the terminus of his own route, without limiting his responsibility by express agreement, such receipt of the goods so directed is *prima facie* evidence of an undertaking to carry the goods to the place where they are directed, and that the rule applies although the place be beyond the terminus of his own usual route, and a loss having occurred in that case beyond such terminus, the carrier was held liable for such loss."

Much more ought the party to be held liable where, as in this case, he has received the goods with an express understanding, as we construe it, that they shall be forwarded to their destination. The word "forwarded," used in this respect, means to be transported or carried, and such was no doubt the understanding of both parties. Such is the construction given to such a receipt in a late case by the Supreme Court of Vermont—*Cutts v. Brainerd*, 1 Am. Rep. 354—where it was held, that the railroad company giving a receipt for goods at Burlington, marked for W. R. Lewis, Brooklin, Iowa, and promising to forward by its railroad, bound itself to carry said box to its destination. We

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think the principle of this case sound and adopt it. We need not go into a review of the various cases on the question, which are numerous both in the United States and in England, and especially contradictory in the United States. We adopt the language of a writer in the American Law Review, vol. 2, 1867-8, that this rule — that a carrier, by simply taking charge and possession of goods delivered to him for carriage, marked and destined to a particular place beyond the terminus of his own road (unless he shall in some clear and express manner, by agreement with the consignor, limit his responsibility to the mere carriage over his own road and safe delivery to next carrier), shall be bound to complete the contract which he impliedly undertakes to perform, more especially when he has expressly undertaken so to deliver the article received — will more nearly reach the equity of the case, and carry out the fair terms of the contract, than any other which can be adopted.

We feel no disposition to relax the rule of liability on the part of railroads, now having almost a monopoly of the transportation of all the products of the industry, as well as articles of merchandise, of this great and rapidly developing country. It would seriously incommode the business of the country if, when property is shipped by one road and must pass over more than this road in order to reach its destination, the shipper, in case of injury to his goods, is to inquire how many routes, and how many different companies make up the line between the place of shipment and delivery, or to determine at his peril which company is liable for the injury. See 24 Barb. 382.

Without citing further authorities on the question, we hold the charge of his Honor in this case to be correct, who held in accordance with the views of this opinion, and affirm the judgment of the Circuit Court.

Judgment affirmed.

Bobo v. Patton.

BOBO v. PATTON.

(6 Helsk. 172.)

Bailment — loss of property held in replevin.

Where property is taken by plaintiff in replevin, and while in his possession pending the proceedings, dies or is destroyed without his fault; he is not liable to defendant for its value in case of a verdict in favor of defendant.

ACTION of replevin by W. P. Bobo against H. C. Patton and another. The facts appear in the opinion. The judgment below was in favor of defendants.

A. S. Marks, for plaintiff in error.

A. A. Hyde, for defendant in error.

SNEED, J., delivered the opinion of the court. The court charged the jury in this case that "if they found for the defendant they will find the value of the animal, with interest thereon and damages since replevied until the present time; or if the proof shows the mare has died, then only to the date of her death." This was error. The plaintiff in replevin, who takes possession of the property pending the litigation, takes the possession with a view to litigating the title. If during such possession and before the trial, by the act of God, or without the fault of the plaintiff, the property be lost or destroyed, the plaintiff is not to be held liable for its value, while he may be held liable for the value of its services during the period of its detention and up to the time when it ceased to be serviceable. The principle is, that if a bond or obligation possible of performance at the time of execution becomes impossible by the act of God, or of the law, or of the obligee himself, the obligation will be saved. Com. Dig., Condition D.; 1 Co. Litt.; *Moore v. Crockett*, 10 Hum. 365; *Mosely v. Baker*, 2 Sneed, 367; *Green v. Smith*, 4 Col. 440; *Bryan v. Spurgin*, 5 Sneed, 685. It is shown in this case that the mare in controversy died in the possession of the plaintiff without fault on his part, and it is shown that she was well cared for, and that the disease of which she died was not the result of inattention or carelessness on the part of the plaintiff, but might have attacked any brood-mare anywhere and under any circumstances. If it be true then that the plaintiff was without fault, he is certainly not liable to pay the estimated value of the animal. The charge was therefore erroneous, and for this error alone the judgment is reversed and a new trial awarded.

Judgment reversed and a new trial ordered.

Nashville and Chattanooga Railroad Company v. David.

NASHVILLE AND CHATTANOOGA RAILROAD COMPANY, plaintiff in error,
v. DAVID.

(6 Heisk. 261.)

Common carrier — liability in unforeseen emergency.

A common carrier while transporting goods in case of accident or emergency is not bound to use all the diligence which human sagacity could suggest in protecting such property, but only to use actively and energetically such means as would suggest themselves to and be within the knowledge and capacity of well-informed and competent business men in such positions and such diligence as prudent skillful men engaged in that kind of business might be expected to use.

Accordingly the failure by a railroad company to provide against a flood of unprecedented height and to take all means to ascertain the coming of such flood whereby goods being transported were lost, provision having been made against a flood equal to the highest previous known rise of water, *held*, not to render the company liable for the loss of the goods.

ACTION by L. David against the Nashville and Chattanooga Railroad Company to recover for the loss of goods. The facts appear in the opinion. From a judgment in favor of plaintiff below the railroad company appealed by writ of error.

No counsel were marked for plaintiff in error.

Baxter, Champion & Ricks, for defendant in error.

FREEMAN, J. This is an action brought by defendant in error to recover for certain goods delivered to the Nashville & Chattanooga Railroad Company at Nashville, to be forwarded to consignees at Knoxville, Tenn., which it is alleged were lost by reason of the negligence of the road, and were ruined and destroyed. The negligence specially alleged was failure to deliver goods in good order to the East Tennessee & Georgia Railroad Co., to be transported to Knoxville.

The defendant pleaded not guilty and that it did not undertake as alleged in the declaration, and gave notice of special matters to be relied on under said pleas.

The notice stated the matter thus to be relied on as follows: The company "will rely on following defenses: first, it is not guilty; second, *non assumpsit*; and third, that the property sued for was destroyed or injured about the time alleged in the declaration by a freshet of unprecedented height, in the Tennessee river, and the loss was unavoidable, and by the act of God, without any negligence or default on the part of defendant."

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These issues thus tendered present the points involved and to be decided by the jury with distinctness and accuracy.

The facts necessary to be noticed in this opinion are that the goods were received at Chattanooga about the 6th of March, 1867, and remained in possession of the railroad during the remarkable freshet of 1867, and were damaged by the water. The water it seems had risen so that it began to interfere with the railroad track on the 6th of March, and was at its highest on or about the 12th of March, reaching a height that submerged the track of the road, and perhaps the depot, some ten or twelve feet. The water seems to have risen, from the 6th for several days, at a rapid rate. All the roads coming in at Chattanooga were broken up, the town submerged, and when the water subsided the track was covered with drift, in some places houses being left on the track by the flood. All the proof shows beyond question that such a flood had never occurred at this place within the memory of man, the old inhabitants who had witnessed other remarkable overflows since 1826, never having seen such a one as this, all agreeing that the water rose about fifteen feet, or near that, above what was known as the highest water-mark in previous freshets.

The proof further shows that a large amount of freight was in defendant's charge at Chattanooga at the time, and the road much pressed with business. We need not go into a further detail of the facts, except to add that the proof shows that in the original location of the road and depot of the company, it was located on ground that was about three feet above what was known as high-water mark, as indicated by previous freshets.

The jury found a verdict for plaintiff, and defendant, after new trial being refused, prosecutes an appeal to this court in the nature of a writ of error.

Several objections are presented to the charge of the court, some of which we will proceed to notice.

The court charged the jury, "If you find that defendant used all the diligence which human sagacity could suggest in protecting plaintiff's property, then you must find for the defendant," and such is the general theory of the charge. This proposition involves the idea that the railroad company must have agents possessed of the *maximum* of human sagacity, and the limit of their diligence or efforts to save these goods must be "all which human sagacity could suggest." This is the statement of a rule the requirements of which could seldom, if ever, be met in the transaction of business of this character, for it would be impossible that all the roads of the country should be able to command employees possessing the highest human sagacity, nor does the law make any such strin-

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gent and unreasonable demand upon them in order to shield them from liability in a case like the present. The sounder rule is this given by the Supreme Court of the United States: citing from 20 Penn. 171, in case of *Railroad Co. v. Reeves*, 10 Wall. 191, "that when carriers discover themselves in peril by inevitable accident, the law requires of them ordinary care, skill and foresight, which is the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them." While the rule is not very clearly expressed or defined by the above statement of it, nor very distinctly illustrated as far as we can see by the reference "to the course of heads of families in matters interesting to them," yet the principle intended to be stated is the true one; that is, that in case of accident or an emergency such as is presented in this case, a railroad company is bound to use such means as would suggest themselves to and be within the knowledge and capacity of well-informed and competent business men in such positions, and such diligence as prudent, skillful men engaged in that kind of business might fairly be expected to use under like circumstances, and that this diligence and these means should be actively used to protect and secure the property confided to their care. In other words, there should be no failure to use actively and energetically all the known and usual means which may fairly be expected to be found within the knowledge of men of average qualifications, engaged in a responsible business of this kind, where large amounts of property of the citizens pass through their hands, and are intrusted to their care.

This view of the principle is very well stated in Smith's Leading Cases, vol. 1, part 1. p. 418, as follows: "As to paid agents, having possession of goods, the contract made and the duty undertaken by them, is to give skill and diligence in the profession or business undertaken by them, and to know the extent of this, reference must be had to the particular profession or business in hand, and the extent of skill and ability ordinarily understood to be required by it. Insufficiency of means or skill and want of diligence, according to the ordinary demands of the business, render the party liable." In fact we think the measure of diligence, skill and capacity in all such cases is readily deducible from the fair understanding of the nature of the contract of the carrier in such cases. The shipper delivers him the goods to be transported by a well-known means from one point to another. The party is fairly understood to undertake that he will use all the known and usual means to comply with his contract, and impliedly engages that the agencies employed by him of every kind shall be such as are in ordinary use in such cases and of full average capacity and skill, if it be men or employees,

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usually found in like employments. The carrier cannot be held fairly to engage to furnish the highest skill or capacity in a case like this, because this is not readily found, nor is it contracted for or expected by the party who employs him. We hold, therefore, that when his Honor said to the jury, that in order to shield the defendant from liability the diligence used (by which he evidently meant the means used) should be "all that human sagacity could suggest," he laid down the rule too strongly and erred.

His Honor instructed the jury on another point, in reference to the facts of the case, too strongly against the defendant, when he tells them: "If it was possible for defendant by *any* means to have been advised from points higher up the river that the river was still rising, and threatening an unprecedented rise, and defendant failed to obtain or use *all* means to obtain the information, so that the goods were lost or damaged, it is liable." Now, here is the same idea in this charge — no limitation at all upon the means to be used, but *all* means are to be used, and if any means not used by which possibly the information could have been obtained of an unprecedented rise in the river, then the liability is fixed. In reference to the facts of this case, this was calculated to mislead the jury. How could the plaintiff in error be reasonably required to use all means to obtain information of an event about approaching in the shape of a freshet, that all past experience in like matters had furnished no previous example, nor any reason on which the use of such means should be demanded? In other words, how could the company be held responsible for not anticipating and preparing for that, which human sagacity, surrounded by the precise state of facts, and with a knowledge of the past history of rises in the river, which surrounded the party here, and with the facts known to defendant's employees, could not have anticipated, unless we require in such case a prescience, such as no human being can either claim or be responsible for not exercising? The true rule should have been stated to be, that if the parties had any reason, in the situation the company occupied, to anticipate that such a flood was about to occur, then it was the duty of the company to use actively and energetically all means at its command, or that might reasonably be expected of a company engaged in their business to possess, to meet the emergency, and save property confided to their care from injury, and any neglect to use the means, as stated above, which prudent, skillful men in that business might ordinarily be expected to use in such an emergency, would subject them to liability. Neglect is the ground of liability on the part of the carrier in such cases. He tells the jury again: "The fact that the defendant may have built its track, depot, warehouse, etc.,

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above any previous known high-water mark is not sufficient. It is bound to provide, or use all reasonable efforts to provide, against extraordinary emergencies, and the fact that the highest track, cars and depot, were above all antecedent freshets and floods is not a valid excuse or release from responsibility in this case, unless it used all proper precaution and diligence in accordance with the principles herein charged."

This charge, in connection with the previous part of the charge to which it refers, would require the same unlimited sagacity, and use of all human means, to anticipate such an extraordinary emergency as the flood occurring at this time, as is required with reference to the question of diligence as hereinbefore discussed, and is consequently erroneous. It might with equal propriety be required that the road should use all reasonable efforts to provide against a flood such as the Deluge in the days of Noah, for in this case there is at any rate one precedent to give warning, while in the other, as far as the proof goes, there was not even one case to indicate to them that such a freshet as the one under consideration might be expected to occur.

Without further criticising the charge of his Honor, it is enough to say, that the theory on which it goes is the use of diligence and means only limited by human capacity, while the true rule only involves the use of such care, diligence and prudence (actively and energetically it is true) as competent and skillful men in such position might reasonably be expected to use, under the circumstances of the case, in the discharge of a responsible trust.

For these reasons the judgment must be reversed.

Judgment reversed.

RUOHS, appellant, v. BACKER'S NEXT FRIEND.

(6 Heisk. 395.)

Libel — statements in legal pleading concerning person not a party.

In proceedings by R. as the next friend of a female infant to remove the guardian of such infant the petition alleged as a reason for such removal that the guardian kept in his family B. a girl whose "reputation is ruined, and she is now an example of shame and prostitution." *Held*, that the statement was conditionally privileged although B. was not a party to the record, and that to render R. liable to B. for libel, malice must be shown.

ACTION by Catherine Backer's next friend against Joseph Ruohs for libel. The facts fully appear in the opinion. From a judgment in

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favor of the plaintiff below the defendant below appealed by writ of error.

Trewhitt & Sharp, Key, Eakin & Key, and Nash H. Burt, for plaintiff in error.

Vandyke, Cook & Vandyke, for defendant in error.

NELSON, J. In a petition filed in the name of Barbara Maurer and Anna Maurer, minors, by their next friend, Jos. Ruohs, addressed to the Judge of the County Court of Hamilton county, and sworn to December 23, 1868, by Joseph Ruohs, the removal of the guardian of petitioners was prayed for; and among the causes assigned for the removal, it was alleged that the guardian "has had in his family a girl, who is now probably over sixteen years of age, who came to live with him at about the age of thirteen years, and has remained in his family ever since. Her reputation is ruined, and she is now an example of shame and prostitution." Catherine Baker, claiming to be the girl thus alluded to, brought this suit, by her next friend, on the 28th of January, 1869; and in her declaration for libel, charges that she is a female under the age of twenty-one years; that she had no interest in, nor connection with, the proceeding in the County Court; that the matter published is false and defamatory; and that the words impute that she had been and was guilty of divers acts of fornication and adultery, and had become a common prostitute and harlot.

The defendant below filed a special demurrer to the declaration, in which he alleges, as cause of demurrer, that the declaration shows that the alleged libel was a matter included in, and part of, a judicial proceeding, and therefore not actionable. The demurrer being overruled, defendant filed a plea of not guilty, and also a special plea of justification, in which he alleged that the petition was a judicial proceeding; that the words were used and written to show that the guardian ought not to retain the guardianship; that he, the defendant, had received information that justified him in making the charge included in said words; that he used the words in said judicial proceeding in good faith and without malice, and that they were never published, unlawfully or otherwise.

The plea of justification was stricken out on plaintiff's motion, and the cause was afterward submitted to a jury upon the plea of not guilty, and a notice, under the statute, of the real defense, substantially embodying the matter of the plea of justification. They found the

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issue in favor of the plaintiff, and assessed her damages at \$5,000. Judgment was rendered accordingly, and a new trial having been refused, the case was regularly brought to this court by the plaintiff in error.

On the trial of the cause, his Honor the Circuit Judge was requested to instruct the jury, in behalf of the defendant, that "if the words published and charged as constituting the libel were used in a judicial proceeding, it devolves on the plaintiff to prove express or actual malice in the defendant before she can recover."

In answer to this proposition the court, referring to the defendant, instructed the jury as follows: "Whether he is protected by the alleged legal proceedings, is a question of law to be determined by the court; and as to this last question the court is of opinion, and so charges you, that the plaintiff in the suit being no party to the record exhibited and used as evidence (meaning the record containing the petition and other proceedings in the County Court) of the judicial proceedings in which it is alleged the libelous words were employed, the defense of privileged communication cannot avail. In this view of the case, you will look to the evidence, and determine from it whether the defendant wrote and published the words laid down in the declaration. If so, were they used in reference to the plaintiff? If not, your verdict ought to be for the defendant. If they were, then you ought to find for the plaintiff."

The court here consider the right of the County Court to entertain the petition and concluded that it had such right and the defendant a right to prevent it.

Having the undoubted right to present the petition, the question recurs, was the reason assigned by the plaintiff in error to the County Court for the removal of the guardian, such a reason as he might lawfully assign, and his petition a privileged communication within the meaning of the law? If a guardian may be removed because "his domestic associations are such as tend to the corruption or contamination of the ward," upon what principle is it that the person seeking the removal may not even name his associates and cause their character to be inquired into? How is the County Court to guard the infant against the corruption or contamination unless its nature is stated and the malign influences, real or imaginary, carefully scrutinized and investigated? And upon what principle is it that the person or persons who are supposed to exert such influences shall be made parties to the suit? There are many cases in which the rights and character of persons who are not parties to the suit become, collaterally, the subject of inquiry, and from

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the nature of the investigation and the necessity of the case, it is impossible that the character of the guardian and the nature of his associations can be inquired into without involving, to some extent at least, the reputation of others. Such inquiries, from their nature, must often be painful and delicate, and cannot be invoked without restriction or responsibility, as will be presently stated; but the right to make them, in the course of a proper judicial proceeding, is unquestionable. The right, under proper qualifications and limitations, exists between individuals, to give information and make inquiry of a similar nature; for, it has been properly said every one who believes himself to be possessed of knowledge which, if true, does or may affect the rights and interests of another, has the right, in good faith, to communicate such, his belief, to that other; and, as an illustration, it is observed that, "if A. believes that B. is, or is intending, to rob C., he has the right to communicate his belief to C., without waiting for C. to inquire on the subject, and if in so doing he injures B., B. is without redress. The exigencies of society require that such a right should exist. A.'s duty to B. is simply not *unnecessarily* to injure him. This right must be exercised, as every other right is required to be exercised, in good faith, and all communications made in the exercise of this right are conditionally privileged." Townshend on Sland. and Lib. 311.

His Honor therefore erred in instructing the jury that the communication was not privileged because the defendant in error was not a party to the record; and in refusing to give the instruction requested—that express or actual malice must be shown on the part of the petitioner.

As this case must be remanded for a new trial, it is proper to state, briefly, so much of the law on the subject of privileged communication as is applicable to the facts appearing in the record.

In the case of *Davis v. McNees*, 8 Hum. 40, 43, "it appeared in proof that McNees was apprehended, and on trial before justices of the peace, on a charge of perjury, prosecuted by Davis. The magistrates consulted and considered that the proof was not strong enough. One of them observed to Davis, the prosecutor, they would have to tax him with the costs, and undertook to explain to him that the mistake of McNees was not material to the issue. Davis said he did not know how they could do that; McNees had sworn falsely and he had proved it," etc. For the speaking of these words, as imputing the crime of perjury, McNees brought this action of slander, and obtained a judgment, which was reversed by this court because it appeared that at the time of the speaking Davis was still in custody; that the judgment of the justices had not been written down; that they were about to tax Davis with the

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costs, and that he used the words in his defense in the course of a judicial proceeding. This view of the law is fully sustained in a recent and valuable American treatise. See Townshend on Sland. and Lib. 273.

The question as to privileged communications was much more carefully and elaborately considered in *Lea v. White*, 4 Sneed, 111, 115. That was an action for libel in a return to a writ of *habeas corpus* for two apprentices. Judge HARRIS, in delivering the opinion of the court, referred to the authorities, and took a distinction between communications conditionally or absolutely privileged—the former not amounting to defamation until it appears that the communication had its origin in actual malice in fact; the latter depending in no respect upon their *bona fides*, but upon the occasion, and the only question in regard to them being whether the matter complained of was pertinent to the occasion. In that case it was said, that “the proceedings connected with the judicature of the country are so important to the public good, that the law holds that nothing which may be therein said with probable cause, *whether with or without malice*, can be slander; and, in like manner, that nothing written with probable cause, under the *sanction of such occasion*, can be a libel.” Ibid. 114. It was further declared in that case, that “the parties, or their representatives, are entitled to state any thing which, though not strictly relevant, may be fairly supposed by them to weigh with the court.” Ibid. 115.

In the learned treatise already referred to, the subject of privileged communications and publications is considered at greater length and with much learning and accuracy, and the different classes of such publications are very fully treated of; but it is sufficient for the purposes of this case to adopt, as we do, two definitions of the author. “By an absolutely privileged communication,” he says, “is not to be understood a publication for which the publisher is in nowise responsible; but it means a publication in respect of which, by reason of the occasion upon which it is made, no remedy can be had in a civil action or libel. A conditionally privileged communication is a publication made on an occasion which furnishes a *prima facie* legal excuse for the making of it, and which is privileged unless some additional fact is shown which so alters the character of the occasion as to prevent it furnishing a legal excuse.” Townshend on Sland. and Lib. 248, § 209.

Although there are authorities which would, perhaps, sustain the petition to the County Court as falling within the definition of absolutely privileged communications, this court is of opinion that a distinction should be taken between statements made in the course of judicial proceedings relative to the parties thereto and those which relate to strangers

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to the record; and that the protection of private character, as well as the peace of society, require that imputations against persons having no connection with the judicial proceeding should, even when properly relating to such proceeding, be considered as falling within the class of conditionally privileged communications. It is true, as a general proposition, that a communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contains criminating matter which, without his privilege, would be slanderous and actionable. Townshend on Sland. and Lib. 250. It is equally true that "for any defamatory matter contained in a *pleading* in a court of civil jurisdiction no action for libel can, as a general rule, be maintained; the power possessed by courts to strike out *scandalous* matter from the proceedings before them, and to punish as for a contempt, being considered a sufficient guarantee against the abuse of this privilege." Ibid. 275, 276. But the author quoted correctly, adds that "whatever may be the reason, it seems certain that where there is a perversion of the right, the policy steps in and controls the individual right of redress." Ibid. 276-7.

We hold, therefore, that the allegations contained in the petition are *prima facie* privileged, being pertinent to the inquiry sought to be had in the County Court; but that, as the defendant in error was a stranger to the record, such of the allegations, if any, as related to her, are only conditionally privileged, and that it must be left to a jury to determine whether the plaintiff below is the person referred to in the allegations, and whether they were made in good faith, with probable cause, and under such circumstances as reasonably created a belief in the mind of the plaintiff in error that they were true. If so made, the plaintiff below cannot recover in this action, for there would be neither malice in law nor malice in fact in the publication. If, upon the contrary, the words in the petition had reference to the defendant in error, and were inserted therein without reasonable and probable cause to believe they were true, then the plaintiff below would be entitled to a recovery of damages.

In *Lea v. White*, 4 Sneed, 115, already cited, it was said that the question whether there be or be not reasonable or probable cause, may be for the jury or not, according to the particular circumstances of the case; and we but follow that decision in directing that this case shall be remanded and submitted to a jury under the instructions above indicated.

Other questions have been presented in argument, but we have deemed it sufficient to consider the controlling questions in the case.

Reverse the judgment and remand the cause.

Judgment reversed.

Harrison v. Willis.

HARRISON v. WILLIS.

(7 Heisk. 35.)

Constitutional law — tax on litigation.

A statute imposing a tax upon each suit at law, to be paid by the unsuccessful party, held not in contravention of a constitutional provision that "all courts shall be open, and every man shall have right and justice administered without sale, denial or delay." (See post, p. 641.)

ACTION by Harrison, Pepper & Co. against T. J. Willis and others.
The facts fully appear in the opinion.

J. W. Judd and G. R. Scott, for plaintiffs.

No counsel marked for defendants.

SNEED, J. Upon a motion to retax the costs in this case in the Circuit Court of the county of Robertson, the plaintiffs, who were the unsuccessful parties in the litigation, moved to strike out the State tax of five dollars, and the county tax of a like amount, adjudged against them, upon the ground that the statute imposing a tax upon lawsuits is unconstitutional and void. The motion was disallowed, and the plaintiffs have appealed in error.

It is insisted that the tax in question is but the imposition of a burthen upon the right of the citizen to go into the courts to have his wrongs redressed and his rights vindicated, and that the statute which authorized the tax is an infraction of that section of our Bill of Rights which declares that "all courts shall be open, and every man, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay." This section of our Bill of Rights is in substance identical with the great principle of English liberty granted by Magna Charta, and was borrowed from the twenty-ninth chapter of that celebrated instrument, which, in its original English version, was in the words following: "No person shall be taken or imprisoned or disseized from his freehold, or liberties or immunities, nor outlawed, nor exiled, nor in any manner destroyed, nor will we come upon him or send against him except by legal judgment of his peers, or the law of the land. We will sell or deny justice to none, nor put off right or justice."

By sections 8 and 17 of our Bill of Rights the great guarantees of

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popular liberty announced in this chapter of Magna Charta were recognized and adopted as a part of the fundamental law of this State, first by the Constitution of 1796, again by that of 1834, and again by that of 1870. By the fourth section of the tenth article of the Constitution of 1796, it is provided: "The Declaration of Rights hereto annexed is declared to be a part of the Constitution of this State, and shall never be violated on any pretense whatever. And to guard against transgression of the high powers which we have delegated, we declare that every thing in the Bill of Rights contained, and every other right not hereby delegated is excepted out of the general powers of government, and shall forever remain inviolate." Hay. & Cobb's Rev. 406.

A provision of equal import is contained in each of our subsequent Constitutions, of 1834 and 1870.

The first statute imposing a tax upon litigation in this State was enacted within three years after the adoption of the Constitution of 1796, and by that statute it was provided that the several clerks and masters of the courts of equity, the clerks of the Superior Courts of law, and the clerks of the several County Courts shall collect the following taxes for the use of the State, viz.: on each suit in equity, five dollars and fifty cents; on each suit in the Superior Courts of law, one dollar and twenty-five cents; on each suit in a County Court, sixty-two and a half cents; on each appeal from an inferior to a superior court, or writs of *certiorari*, one dollar; and the taxes in equity and suits at law shall be taxed on the execution when the suits are determined. Act 1799, ch. 30, § 1; Hay. & Cobb's Rev. 349. By the act of 1817, ch. 138, this act of 1799, ch. 30, was amended so as to require the several clerks of the Circuit and County Courts to collect the sum of one dollar on each suit commenced by original writ or attachment, and the same on every suit taken to the Circuit Court from the County Court by appeal or *certiorari*; also, the sum of one dollar on each indictment or presentment, and the sum of fifty cents on each appeal or *certiorari* from before a justice of the peace, in addition to the tax already collected by law, which shall be taxed on execution as heretofore. Hay. & Cobb's Rev. 349. And by the act of 1827, ch. 49, upon a successful motion by the solicitor against the clerk or other collector of public taxes, a tax fee was allowed the solicitor, "in case it be collected of defendants." Id. 362.

These several statutes authorizing a tax upon judicial proceedings were in full force and operation when the Convention of 1834 met and adopted the Constitution of that year, wherein it is declared that "all laws and ordinances now in force and use in this State, not inconsistent with this Constitution, shall continue in force and use until they shall

expire, be altered or repealed by the legislature." Const. 1834, art. XI. § 1. The legislature which assembled next after the adoption of the Constitution of 1834, recognized and adopted these laws by re-enacting them, with certain changes, in the words following: "Each and every person who shall be unsuccessful in any suit in equity shall pay a tax of two dollars and fifty cents; on each suit in the Circuit Court, two dollars and twenty-five cents; on each appeal, writ of error or *certiorari* from the Circuit or Chancery Courts to the Supreme Court, two dollars; on each appeal or writ of *certiorari* from before a justice of the peace, one dollar and sixty-two and a half cents; and each indictment or presentment, one dollar." Act of 1833, ch. 13, § 4; Car. & Nich. Rev. 604. By a subsequent act these taxes were increased as follows: on each suit in law or equity, three dollars and fifty cents; on each petition filed in any of the courts of record for the division and distribution of estates, three dollars and fifty cents; on each appeal, writ of error or *certiorari* from the Circuit or Chancery Courts to the Supreme Court, three dollars and fifty cents; on each appeal or *certiorari* from before a justice of the peace, two dollars; and on each presentment or indictment, two dollars. Code, § 553. And by section 551 it is provided that the taxes aforesaid shall be paid by the unsuccessful party in litigation, and in prosecutions for offenses against the criminal laws by the party taxed with the costs. By the act of 1865, ch. 8, these laws were again remodeled, and the tax on each original suit in any of the courts of law or equity fixed at five dollars. And such was the state of the law upon this subject when the Convention met in 1870 to reorganize the State government, and when the Constitution of that year was adopted and proclaimed.

By the first section of the eleventh article of that instrument, it is ordained that all laws and ordinances now in force and use in this State, not inconsistent with this Constitution, shall continue in force and use until they shall expire, or be altered or repealed by the legislature. We have thus been careful to show the state of the law upon this subject from the foundation of the government to the present hour, and to trace the changes of the organic law, that it may be seen that on at least two memorable occasions in the history of this Commonwealth, the people have met in convention, having similar laws upon the statute book, some of which are as old as the State itself, and have reorganized their government without any ordinance or provision which, in express terms, abrogates or reprobates this kind of legislation. While, therefore, we cannot assume that the provisions of the two Constitutions of 1834 and 1870, adopting and approving the laws then in force, so far as they are not inconsistent with those instruments, give the constitutional sanc-

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tion to these statutes, yet we must hold these facts to be a persuasive argument which tends to invite, if not to justify, such an assumption.

It has been well stated at the bar that time cannot consecrate a wrong, and that a statute which violates the organic law, though it has been acquiesced in as of unquestioned validity for generations, is not the less an iniquity on account of its years. It therefore becomes us to inquire, without reference to the antiquity of these laws, and to the circumstances referred to, which would seem to have forestalled this investigation, whether they are in fact repugnant to the provisions of the Constitution, that "the courts shall be open, and every one, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay." It may be observed at the threshold, that a relinquishment of the right of taxation is not to be presumed unless expressed in terms too plain to be mistaken. *Jefferson Branch Bank v. Skelly*, 1 Black, 436; *Gilman v. Sheboygan*, 2 id. 510; *Phil. and Wilmington R. R. Co. v. Maryland*, 10 How. 376. The power to tax in a government involves its power to exist. It is the chief and fundamental attribute of sovereignty, and the objects and sources of taxation are, in general, bounded only by the jurisdictional or territorial limits of the State, and extend to and embrace all privileges, rights, properties, and franchises not exempted in the organic law. It is the condition of citizenship that the enjoyment of all these shall be protected by the government, if the citizen will pay tribute upon them for his own and the general weal. Thus, said Chancellor KENT, the power of State taxation is to be measured by the extent of State sovereignty, and this leaves to a State the command of all its resources, and the unimpaired power of taxing the people and property of the State. 1 Kent's Com. 461. The power of taxation, said MARSHALL, C. J., is an original principle, which has its foundation in society itself. It is granted by all for the benefit of all. It resides in the government as part of itself. * * * However absolute the right of any individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature.

This vital power may be abused; but the interest, wisdom, and justice of the representative body, and its relation to its constituents, furnish the only security against excessive as well as against unwise taxation. And it is said to be unfit for the judicial department to inquire what degree of taxation is the legitimate one, and what degree may amount to an abuse of the power. *Vide McCulloch v. Maryland*, 4 Wheat. 428, 430; *Providence Bank v. Billings*, 4 Pet. 561. And so it is said in

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another case: "If the right to impose a tax exists, it is a right in its nature acknowledging no limit. It may be carried to any extent within the jurisdiction of the State which imposes it which the will of such State may prescribe." *Weston v. Charleston*, 2 Pet. 449; *Bank of Commerce v. New York City*, 2 Black, 631. It was an observation of Lord BACON, "that no people overcharged with tribute are fit for empire." And yet the power of taxation in a State could not well be circumscribed without peril to the State itself. It being, therefore, the unquestionable right of every government to tax every thing, and to tax without limit unless the limitation be imposed by the organic law, we must look to the latter, to find the restrictions, if any, imposed in this respect upon the legislative department here.

We have seen that the laws authorizing a tax upon lawsuits, to be paid by the unsuccessful party, had their origin soon after the organization of the State government under the Constitution of 1796, and having existed ever since, they have passed the ordeal of two Constitutions without express repudiation or disapproval. And it would seem remarkable that a law enforced almost every day in some part of the State, for more than seventy years, and which has brought its thousands and hundreds of thousands of revenue into the State and county treasuries, should have been suffered so long *sub silentio*, to oppress the citizens, if it be, indeed, repugnant to the Constitution. And it would seem yet more strange that in the two conventions which sat to deliberate upon this important question, with these laws before them, the subject of exemptions should have engaged the attention of both, and yet that the whole instrument should be silent upon this subject. We find on the other hand that all property, real, personal and mixed, and all privileges shall be taxed, without other restriction than that taxes shall be equal and uniform; that only certain property held by the State, or cities, or towns, and used exclusively for public purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary, or educational, may be exempt, and that by the terms of the Constitution only one thousand dollars worth of personalty in the hands of each tax payer, and the direct products of the soil in the hands of the producer, or his vendee, shall be exempt from taxation.

These two latter, of all the vast resources of the State, are alone expressly exempted from taxation by the terms of the Constitution itself. And among the few which may be exempted, at the option of the legislature, the subject of this present inquiry does not appear. If it be true then that the laws imposing a tax upon lawsuits are incompatible with the seventeenth section of the Bill of Rights, there must be some mar-

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velous obscurity in that section, since it has escaped the scrutiny of two conventions, and the vigilance of two generations not distinguished for their indifference to their constitutional rights. We are free to confess that the able and ingenious arguments submitted at the bar upon this question, on behalf of the plaintiffs, had for a time generated doubts and difficulties to which we were strangers before; but we imagine that these doubts will disappear as this subject is more thoroughly investigated. If we are correct in assuming that the power of taxation in a government is unlimited except by the organic law, then the right of entering the courts for the purpose of litigation, whether considered as a species of property, a franchise, or privilege, is one that cannot escape this all-pervading power. Whether a law is void for repugnancy to the Constitution, is at all times a question of delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other. *Potter's Dwarr.* 65; 6 *Cranch*, 128.

The right to litigate in the courts is a common right, and therefore it cannot be said to be taxable as a privilege. A privilege, in the sense of our revenue laws, is "a power granted to an individual or corporation to do something, or to enjoy some advantage which is not of common right." 2 *Meigs' Dig.*, § 1587; or, in the language of this court, it is a license, or permission to do that which in general is prohibited. *Mabry v. Tarver*, 1 *Hum.* 94, 98. But the right to litigate one's rights in the courts is a species of property — an incorporeal property — and all property is taxable in this State.

Property is corporeal or incorporeal. The first, it is said, comprehends such as is perceptible to the senses, as lands, houses, goods, merchandise, and the like; the latter consists in legal rights, as choses in action, easements, and the like. 2 *Bouv. L. D.* 387. But it is said that, in the words of MARSHALL, C. J., the power to tax involves the power to destroy, and if the legislature can tax the lawsuit at all, they may tax it so heavily as to render the right itself nugatory and of no avail. To this we reply in the words of the same eminent jurist, that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself.

In imposing a tax, the legislature act upon their constituents. This is, in general, a sufficient security against oppression and erroneous tax-

ation. *McCulloch v. Maryland*, 4 Wheat. 428. But it will be insisted that the courts shall be open, and every man, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice without sale, denial, or delay. The promise is not to the man who deals unjustly, who builds his house by unrighteousness, and who defrauds and wrongs his neighbor, but to him who has been injured in his lands, goods, or reputation.

The tax is imposed on the "unsuccessful party," who, in the opinion of the tribunal adjudicating the case, is in the wrong — who has not been injured in his "lands, goods or reputation," but who has wronged his adversary; and it becomes, therefore, in this view, not a tax upon the judicial remedy, but a tax upon unrighteous litigation. If, indeed, the tax were upon the plaintiff as a condition precedent to his litigating his right in court, yet no tax could amount to an inhibition upon him, as we have our actions *in forma pauperis*, with one or two exceptions, as a remedy in all conceivable cases. The clause of the Constitution now under consideration was, to some extent, considered and expounded in an early case in this court, in which it was said, we must understand the meaning to be, that notwithstanding any act of the legislature to the contrary, every man shall have right and justice without sale, denial or delay.

That is to say, for the attainment of justice — the end of law — right must be administered without sale. Original process must issue without price, except what the law fixes, and without denial, though the defendant be a favorite of the King who interferes in his behalf, and must be proceeded on by judges, after suit instituted upon it, without delay, either of themselves or by order of the King, or as we say, act of the legislature. And the judges where the cause depends must issue the proper judicial process without fee or reward, except that fixed by law. This, say the court, is the long fixed, well-known meaning and legal construction of the words right and justice, without sale, denial, or delay. *Townsend v. Townsend*, Peck, 1, 15, citing 2 Inst. 55, 56; 1 Meigs' Dig., § 521. It is in our opinion clear that the law may impose terms upon the right of litigation, provided the same be uniform and in the shape of a public tax for the general benefit without a violation of the letter or spirit of the seventeenth section referred to. It is said by an ancient law writer of England that so much of the twenty-ninth chapter of Magna Charta, as makes King John assert that he will sell or deny justice to none, nor put off right or justice, was extorted from the monarch because it was usual to pay fines anciently for delaying law proceedings. This sometimes was extended to the defendant's life. Some-

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times fines were paid to expedite process and to obtain right. And in some cases the parties litigant offered part of what they were to recover to the crown. Many instances of fines are mentioned for the King's favor, and there is a particular instance of the Dean of London paying twenty marks as a fine to the King, that he might assist him against the Bishop in a lawsuit. Observe Mag. Chart. 21.

The courts of law were not in those times open courts, says the same author, as they are now understood to be. An open court at present (1766) is generally so crowded with spectators that no one who hath any real business to do can have access; or if he procure access, he is not so much at his ease as those whose interests are depending have a reasonable right to insist upon. The old law required that the plaintiff or defendant should pay nothing, but that the idle part of the audience should pay one penny each for admittance, which may be nearly equal to a shilling at present, when the servants of judges at the old Bailey, and the officers of the courts in Westminster Hall, have upon certain occasions taken not only a penny from the spectators, but even insisted on gold. Are they not within the letter and the spirit of the law? asks this quaint old expounder, and is it not incumbent on the judges to put it in execution agreeable to what is enjoined? Id. 102. These little circumstances, says he, show strongly that to the "manners of the times," we are undoubtedly indebted for that great principle of Magna Charta which forbids the sale, denial or delay of justice, and not the just and legitimate exercise of the taxing power, which is for the benefit of all, and not for the exclusive behoof of the servants of judges at the old Bailey or the officers of the court in Westminster Hall. The object and purview of this celebrated chapter of Magna Charta are therefore best interpreted by the "manners of the times," which led the barons to demand it. Thus we are told by the historian that "the ancient Kings of England put themselves entirely on the footing of the barbarous eastern princes, whom no man must approach without a present; who sell all their good offices, and who intrude themselves into every business that they may have a pretext for extorting money. Even justice was avowedly bought and sold; the King's court itself, though the supreme judicature of the Kingdom, was open to none that brought not presents to the King; the bribes given for the expenditure, delay, suspension, and doubtless for the perversion of justice, were entered in the public registers of the royal revenue, and remain as monuments of the perpetual iniquity and tyranny of the times.

The Barons of the Exchequer, for instance, the first nobility of the kingdom, were not ashamed to insert as an article in their records that

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“the County of Norfolk paid a sum that they might be fairly dealt with: the Borough of Yarmouth, that the King’s charter which they have for their liberties, might not be violated; Richard, son of Gilbert, for the King’s helping him to recover his debt from the Jews; another that he might be permitted to make his defense in case he were accused of a certain homicide; another still, for free law if accused of wounding another; and another for having an inquest to find whether certain parties were accused of murder out of ill will or for just cause.” These are a few of a great number of like instances preserved in the ancient rolls of the Exchequer. 1 Hume’s Hist. Eng. 504. These are the sales, delays and denials of justice, which influenced the Barons, in the words of the historian, “to take an oath before the high altar to adhere to each other, to insist on their demands and to make endless war on the King till he should submit to grant them.” Id. 462.

We apprehend that in the three conventions of Tennessee the idea of taxation was never for a moment considered in connection with the seventeenth section of the Bill of Rights. As it was official plunder and not taxation which gave it birth in Magna Charta, so it was ordered as a part of our own organic law, in the light of history, not to circumscribe this high attribute of sovereignty, but to elevate the standard of judicial morals, to purify the fountains of justice and warrant forever the right of the injured citizen to enter the courts and demand his rights upon such terms, applicable to all alike, as the law may prescribe for the general good.

Let the judgment be affirmed.

Judgment affirmed.

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(7 Heisk. 156.)

Negotiable instrument — conditional acceptance of bill.

A bill was accepted upon condition that the drawer should perform certain acts before he negotiated the same. He however negotiated it without performance of such acts. *Held*, that the acceptor and indorser were liable to a *bona fide* purchaser for value before maturity, and without notice of the condition and its non-performance. *Held*, also, that the possession of the bill by the drawer did not affect the purchaser from him with notice of the equities.

ACTION on a promissory note. The facts fully appear in the opinion.

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John F. House and Horace Lurton, for plaintiffs.

Wm. A. Quarles, for defendant.

NICHOLSON, C. J. This was a suit in the Montgomery Circuit Court by H. C. Merritt against H. P. Duncan and others, on a bill of exchange for \$3,000. The bill was drawn by H. D. Duncan on H. P. Duncan, and by him accepted. It was payable to H. D. Duncan, the drawer, and indorsed by him, J. W. Selby, W. B. McGregor, Lewis Shepperd, and Wm. Griffy. It was dated on the 11th of November, 1868, payable at ninety days from date, and negotiated on the 16th of November, 1868, to H. C. Merritt.

The declaration was in the usual form. The defendants put in separate pleas, denying in general terms their liability, and special pleas were filed by all except H. D. Duncan, the drawer, denying their liability, for the reason that their acceptance and indorsement were not absolute, but conditional

Plaintiff entered a *nol. pros.* as to McGregor and Selby, and proceeded to trial against the other parties. Under the charge of the court, the jury found against H. D. Duncan, and in favor of the other defendants. From the judgment rendered on this verdict the plaintiff has appealed in error to this court. The errors relied on for a reversal are assigned upon the charge of the court. Those portions of the charge specially excepted to are as follows :

“ If you find that H. D. Duncan owes the drawer and payee of the bill, and that he procured H. P. Duncan to accept it, he not having any funds of H. D. Duncan in his hands, and that he procured defendant Griffy to indorse it upon the express condition that said H. D. Duncan should make a deed of trust to a sufficient amount of property to save them harmless in the event they had said bill to pay, and also that he would procure other solvent persons to indorse with them before he was authorized to dispose of the bill ; and if you believe that the defendant, H. D. Duncan, passed said bill to plaintiff in person and received the consideration for it, without having complied with the conditions upon which he procured the acceptance and indorsements, then it would be an escrow, and would not bind defendants, H. P. Duncan and Wm. Griffy.”

Again : “ If you should believe that plaintiff came in possession of the bill in due course of trade, and took it from the apparent owner, then the last indorser would be liable to him, though the bill was a forgery ; but due course of trade is when the buyer takes the bill before it is due, and from the last indorser, by parting with his money or property in

good faith for it. On the other hand, if the plaintiff took the bill from the drawer and payee, this would not be a taking in due course of trade, but would be a circumstance of suspicion, and would affect him with notice of any equities between the original parties to the bill, although he did not have any actual notice."

The first proposition, when analyzed, is, that if the drawer of the bill procured it to be accepted and indorsed upon specific conditions, he then took it as an escrow, and his sale of the bill to the plaintiff was not binding on the acceptor and indorser.

This proposition assumes that when a note or bill is indorsed or accepted upon a condition, the maker or drawer cannot sell it, even to a *bona fide* purchaser without notice, so as to bind the acceptor or indorser. It ignores the distinction between a purchaser with and one without notice of the condition upon which the acceptance was made. In the case before us the proof is that H. P. Duncan refused to accept the bill except on condition that William Griffy should become indorser, and that he should be indemnified by deed of trust; that William Griffy refused to indorse except on condition that Ransom Morrow should indorse before him; that the bill was received by the drawer on these conditions; and that it was sold to plaintiff without any compliance therewith. It is proved by the plaintiff that he purchased the bill without any notice of the conditions on which it was accepted and indorsed.

Assuming these facts to be true, it is clear that H. D. Duncan was guilty of fraud upon the acceptor and indorser, in selling the bill in violation of the agreement on which he procured the acceptance and indorsement. It is equally clear that the purchaser got no title on which he could recover as against the acceptor or indorser, unless the fact that he was a purchaser in good faith, for value, and without notice of the conditions, would give him such title.

In the case of *Small v. Smith*, 1 Denio, 583, it was determined that if the note be transferred by the maker in violation of an agreement with the accommodation indorser, the holder cannot recover against the indorser without proving that he received it in good faith, upon a valuable consideration, and without notice of the arrangement on which the indorsements had been made. The principles, say the court, admit no dispute, and although upon some points of commercial law in close proximity to these, discordant opinions may be found, there is entire harmony as to those mentioned. The same doctrine is laid down in *Nallett v. Parker*, 6 Wend. 615; *Mickles v. Calvin*, 4 Barb. 304; *Woodhull v. Holmes*, 10 Johns. 231; *Munroe v. Cowper*, 5 Pick. 412.

The same doctrine was laid down with clearness and precision in the

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case of *Van Wyck v. Norvell*, 2 Hum. 195. Judge GREEN said: "It is settled as a general rule, that a holder coming fairly by a bill or note has nothing to do with the transaction between the original parties, and if negotiable paper is transferred for a valuable consideration without notice of any fraud, the right of the holder shall prevail as against the true owner. This principle is an exception to the general rule of law, which is, that the true owner is entitled to his property wherever he may find it. But with a view to favor the credit and circulation of commercial paper, it has been deemed consistent with sound policy to adopt in relation to such paper this rule." In *Murray v. Lardner*, 2 Wall. 121, the court say: "The possession and title are one and inseparable. The party who takes it before due, for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world."

The cases of *Perry v. Patterson*, 5 Hum. 133, and of *Arode v. Dixon*, 6 Exchequer, are not in conflict with the rule recognized in the several authorities cited. In neither did the question arise whether the holder of the note purchased it without notice of the fraud perpetrated in its transfer; nor could the purchaser, under the facts in either case, rely upon the benefit of the rule which protects an innocent purchaser, for value, without notice. The charge of the judge in the case before us was erroneous, and necessarily misled the jury.

To the other portion of the charge above quoted, several objections are taken. The judge defines "due course of trade," and by his definition he seems to make it essential that the buyer should take the bill from the last indorser, in order that he should be a purchaser in due course of trade. It is true that the legal title to the bill must pass from the last indorser to the purchaser, but the drawer may be in possession of it as its apparent owner, or as the agent of the indorser, and as such may pass it to the purchaser, and in such case his title would be as good as if it passed to him directly from the last indorser, provided his purchase was *bona fide*, for value, and without notice of fraud.

It is next objected that the judge instructed the jury, that if the plaintiff took the bill from the payee or drawer, this would be a circumstance of suspicion, and would affect him with notice although he did not have actual notice of any equities between the original parties. The judge lays it down as matter of law that if the purchaser of the bill takes it from the drawer, he is thereby affected with notice of prior equities. The fact that the drawer of a bill, after it has been indorsed, has it in his possession for sale does not, as matter of law, carry with it the force of notice of prior equities to a purchaser,

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but it is a fact which may have weight or not, according to the surrounding circumstances, to be looked to in determining whether the purchaser had notice or not.

It was therefore erroneous in the judge to instruct the jury that the fact that the drawer of the bill passed it to the plaintiff affected him with notice of prior equities between the parties to the bill.

There is a conflict in the authorities as to whether the holder of a bill or note can claim the benefits of an innocent purchaser, if he has no knowledge of prior equities, but has notice of such circumstances as might reasonably create suspicion that the bill or note was not good.

This question was elaborately considered by the United States Supreme Court in *Goodman v. Simonds*, 20 How. 343. It appears from the examination of the authorities cited in that case, that the English rule is, that the holder of commercial paper is protected, as the owner thereof, unless it be shown that he took it with knowledge of prior equities between the antecedent parties to the instrument. The same rule is adopted by the United States Supreme Court. Judge CLIFFORD says: "And the question whether the party had such knowledge or not is a question of fact for the jury, and like other disputed questions of *scienter* must be submitted to their determination under the instructions of the court; and the proper inquiry is, did the party seeking to enforce the payment have knowledge, at the time of the transfer, of the facts and circumstances which impeach the title as between the antecedent parties to the instrument? And if the jury find that he did not, then he is entitled to recover, unless the transaction was attended with bad faith, even though the instrument had been lost or stolen. Every one must conduct himself honestly in respect to the antecedent parties when he takes negotiable paper, in order to acquire a title which will shield him against prior equities. While he is not obliged to make inquiries, he must not willfully shut his eyes to the means of knowledge which he knows are at hand, for the reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith."

While it is probably true, that the preponderance of authority is in support of the rule as announced in the case of *Goodman v. Simonds*, yet a different rule has prevailed in our State. In the case of *Hunt v. Sanford*, 6 Yerg. 387, Judge GREEN said: "It is certainly true as a general principle, that when the holder of a note or bill acquires it fairly in the usual course of trade, he has nothing to do with the original parties. But in any case in which the indorser takes the paper under circumstances which might reasonably create suspicion that it was not good,

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he takes it at his peril." The same doctrine was recognized in *Van Wyck v. Norvell*, 2 Hum. 195; and in *Ryland v. Brown*, 2 Head, 273. Judge MCKINNEY said: "It is not pretended that the defendant is not a *bona fide* holder of the note for a valuable consideration, without notice of the facts upon which, according to the assumption, its validity may be impeached. * * * * *

It is considered that whatever is sufficient to put a person upon inquiry is equivalent to notice; and that when he has sufficient information to lead him to the knowledge of a fact, he shall be presumed to be cognizant of the fact." And, again: "We fully assent to the legal proposition, that if Brown at the time he took the note had notice, actual or constructive, that it was void, or subject to be impeached in the hands of Thompson, either for fraud, or want or failure of consideration, he will hold it subject to the same equities to which it was liable in the hands of Thompson."

It will be observed that according to the course of decisions in our State, we apply the same rule to the purchaser of a note or bill which we apply to purchasers of other property.

We hold that one in possession of a note or bill subject to a transfer by delivery is presumed to be the owner. And a purchaser of a note or bill so held, before it became due, for valuable consideration, and without notice of prior equities, takes a good title. But if he had either actual or implied notice of prior equities; that is, when any thing appears, either on the face of the note or bill or *aliunde*, which would put a man of ordinary prudence on inquiry, the law presumes that such inquiry was made, and therefore fixes the notice on him as to all legal consequences.

The rule which has obtained in England and in the United States courts, and in the courts of several of the States, rests upon the assumption that the importance of protecting negotiable paper for the benefit of commerce is so great that the purchaser of it should stand on a different and more favored ground than the purchasers of other kinds of property.

Thus far, the reason for this distinction has not been sufficiently obvious to induce either our courts or legislature to change the rule which has prevailed in our State, and we are content to adhere to it. When nothing appears on the face of the bill or note to awaken inquiry, and the purchaser buys for value in the due course of trade, he occupies the position of a *bona fide* purchaser for valuable consideration, without notice of prior equities, and has a right to recover against the antecedent parties. This right to recover can be defeated only by proving such facts and cir-

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cumstances as would satisfy a jury that he had either actual or implied notice of the prior equities. When such facts and circumstances are proven, he is bound to make inquiry; otherwise he buys at his peril. Such is the rule in our State.

It affords ample protection to the purchasers of negotiable paper, but it also protects antecedent parties against frauds upon their rights. The other rule permits the purchaser of negotiable paper to remain passive, and make no inquiry, though he may be cognizant of suspicious circumstances as to the validity of the bill he is getting. He must not shut his eyes to the means of knowledge which he knows are at hand, but he is not obliged to make inquiry. If he can escape the charge of bad faith, he is entitled to recover.

The distinction attempted to be drawn by Judge CLIFFORD in *Goodman v. Simonds* between bad faith and passive non-action by a purchaser cognizant of suspicious facts and circumstances adverse to the title he is getting, is so thin and refined that we are at a loss to appreciate its importance. If a man has information which is calculated to throw suspicion over the title of property which he is about buying, and declines to inquire whether the suspicion is well founded or not, but proceeds to buy and take title, in a court of conscience he is guilty of a fraud. But according to the reasoning of the judge, he is not guilty of bad faith, and is an innocent purchaser, and to be protected as such.

We are of opinion that our rule is better calculated than the other to promote strict honesty in transactions of negotiable paper on the purchasers, and still to secure to them full protection.

For the errors indicated the judgment is reversed.

Judgment reversed.

 BURKE V. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

(7 Heisk. 451.)

Negligence — fire set by locomotive — burden of proof.

In an action against a railroad company to recover for loss by fire caused by sparks from the defendant's locomotives, the burden of proof of negligence does not lie upon plaintiff, but it is for defendant to show that it was not negligence. (See note, p. 623.)

ACTION by Margaret Burke against defendant to recover for loss caused by fire set by sparks from defendant's engine. The facts

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appear in the opinion. The defendant below brings the action to this court by writ of error after judgment for plaintiff.

J. W., C. R. & Lee Head, for plaintiff in error.

G. W. & B. F. Allen, for defendant in error.

SNEED, J. The plaintiff brought this action to recover judgment for the alleged destruction by fire of her house and furniture on the night of the 15th of September, 1870, which she charges were ignited by sparks or fire from the locomotive engine of defendant. The value of the property shown to have been destroyed by the fire, including the building and furniture, and the clothing of herself and her minor children, was about \$1,400. The verdict of the jury ascertained her damages to be \$1,063, upon which judgment was pronounced, and an appeal in error taken by defendant.

The defendant is an incorporated railroad company, and had constructed its road some years before the house of the plaintiff was erected. The building stood upon the south side of the defendant's road, and distant about thirty yards therefrom. There is no positive testimony as to the fact of ignition, but the question was submitted to the jury upon the circumstantial evidence adduced, and they believed that the fire was occasioned in the manner charged, and have pronounced accordingly. It is shown that at 9.40 P.M., on the night of the fire, two freight trains passed the house of the plaintiff in the village of Hendersonville, and it was observed by persons in the vicinity, that large quantities of sparks were emitted from the smoke-stacks of the engines, which were borne upon a light wind in the direction of the plaintiff's house. The building was of wood and roofed with cypress shingles. The family had retired and were asleep at the moment the trains were passing. The plaintiff and her daughters, and others, tenants of the building, testify that there had been no fire upon the premises after six o'clock that evening, that but one candle had been lighted in the house that night, which, with the fire in the cooking stove, had been extinguished before the family had retired for the night. The plaintiff states that "something after ten o'clock," to use her own words, she was awakened by a noise as of "crackling timber," in the burning house, and upon running out she discovered the roof of the building nearest the railroad on fire, that she aroused the family, all of whom escaped, and that the house and nearly all its contents were rapidly consumed. It was shown, as already stated, that on the night in question, the engines of the defendant, as they were

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passing the village, were ejecting a great quantity of sparks. It was also shown that one of the engines on that night was burning coal fuel and the other wood, and that the latter generated more sparks than the former. And over the objections of the defendant, it was also shown that on previous occasions other engines of the defendant had been seen to emit sparks which were borne much further on a light wind than the distance between the road and the plaintiff's house, sometimes fifty yards, at others the length of a train of twenty cars, and that fences and grass along the way had now and then been ignited by the falling sparks. It was also shown that in the last half mile in the approach to the village in the direction the trains were going that night, there was an up-grade, and that the emission of sparks was incessant by the increased labor of the engines upon an ascending grade. On behalf of the defendant, it was shown by the two engineers on the respective trains, that on passing the plaintiff's house that night their smoke-stacks were in good order, and that they were not emitting an unusual quantity of sparks. It was shown also that the engines drawing freight trains were only allowed to ply between the cities of Nashville and Bowling Green, and that upon the daily arrival of trains at Bowling Green, it was the unvarying rule of the company to have each engine run into the round-house for inspection, and for repairs if any should be necessary, and that no engine is permitted to start on another trip until it shall have been thus inspected.

The inspector testifies that on the evening of the 15th of September, 1870, before the two engines in question left Bowling Green for Nashville, he had carefully inspected the smoke-stack of each, and both were found to be in perfect order; that the locomotives used at that time by the defendant were of the best and most approved class, and only those with all the latest and best improvements attached were used. The smoke-stacks are described as being built with two stacks, an outer and an inner stack; over the inner stack is a cone against which sparks strike as they ascend and are thrown back. Above this cone, and covering the mouth of the outer stack, is a wire netting known as a spark catcher. This is made very firm so as to prevent the escape of any large sparks. All the locomotives used by defendant are constructed in this way. The two engines in question were carefully inspected by this witness before they started on their trip on the evening of the 15th of September, 1870. They were found to be in perfect order and provided with all the improvements mentioned to prevent injury or accident by fire. Upon cross-examination the witness stated that *if the smoke-stacks were right they could not throw out any sparks large enough to do damage, and that if they did emit sparks in immense quantities, it would be evidence*

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that they were out of repair. It is shown that the smoke-stack of a locomotive is injured by long use ; but the length of time the two engines in question had been in use is not stated ; nor is the distance between Bowling Green and Hendersonville given. The master mechanic of the company testifies that it is impossible to construct an engine so as to prevent the escape of sparks. If it were done it would destroy the use of the engine, as then there would be no draught, and consequently the engine could not do its work ; that some sparks will necessarily escape. He states that a wood-burner is more dangerous than a coal-burner ; but in 1870 the supply of coal was not sufficient to enable the defendant to use coal altogether. He says that sparks from a smoke-stack would be carried on a light wind from fifty to one hundred yards ; that he had heard of engines used in cities on street-cars from which sparks did not escape, but he never heard of one so constructed that it could be used upon an ordinary railroad, and that the smothering of the draught so as to prevent entirely the escape of sparks would destroy the efficiency of the engine.

Upon this state of facts, the court, among other things not excepted to, charged the jury as follows : “ If you find from the testimony that the house of the plaintiff was burned, and that it was fired by a brand from a locomotive that was then being run upon defendant’s road, you will then look to the testimony and see whether the burning of the house resulted from the carelessness or negligence of the employees of defendant, and if so, your verdict should be for the plaintiff, and the measure of damages would be what it would cost in cash, at the time and place of the burning, to replace the house and each article consumed in it, with interest from that time to the present, if you think proper to allow interest. If the testimony shows that the defendant was running locomotives over its road so constructed as to let brands of large size escape, or if such locomotive was properly constructed, or constructed so as to prevent the escape from its smoke-stack of large brands when in good order, it was so much out of order as to permit the escape of brands that endangered buildings standing within the distance that plaintiff’s house stood from the road, and they continued to run such engine, notwithstanding the danger of setting buildings in the near vicinity of the road on fire, without repair, this would be such carelessness or negligence as would make the company liable for damages if any house should be fired by such locomotive under the circumstances just mentioned. On the other hand, if you find from the testimony that the defendant procured for its road locomotives constructed with the latest improvements to prevent the escape of brands, and that it used such diligence and care in running such locomotives as a prudent man would about his own busi-

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ness and affairs, and brands did escape from such locomotives and set fire to the plaintiff's house, under such circumstances the defendant would not be liable to the plaintiff, and your verdict will be for the defendant.

[The charge here considers an immaterial point.]

Among other instructions substantially given in the foregoing charge, the defendant requested the following, which were not given: 1. "If the plaintiff seeks to recover upon the ground of negligence, the burden of the proof of negligence lies on the plaintiff."

[The other points are not material.]

With respect to the first proposition, that if the plaintiff seeks to recover upon the ground of negligence, the burden of proof of negligence lies upon the plaintiff, the court is of opinion that such is not the law as applicable to this kind of case. If the fact be made to appear that the plaintiff's house was fired by sparks from the defendant's engine, and that sparks in unusual and dangerous quantities were ejected from the engine on the occasion in question, it is peculiarly within the power of the defendant to show that it was without fault or negligence of its own. It may be observed that in an action like this the law requires that "the plaintiff must not only prove that the fire which destroyed her property might have proceeded from the defendant's engine, but must show beyond a reasonable doubt that it did so originate. *Shearman & Redfield on Neg.*, § 333; *Shelton v. Hudson River R. R. Co.*, 29 Barb. 226. The plaintiff in the latter case proved that his mill was sixty-seven feet from the railroad, and that in a little more than an hour after the passage of a locomotive emitting sparks, the mill was found to be on fire. This evidence was held to be insufficient. *Smith v. Hannibal & St. Jo. R. R. Co.* is to the same effect. 37 Mo. 287. In *Freemantle v. London & Northwestern R. Co.*, 10 C. B. 89, a verdict on such evidence was sustained. It is sufficient to say on this subject, that while, in the absence of any positive proof of the means of ignition, a full conviction of the fact may be generated by circumstances, yet the jury must be careful not to base their verdict upon mere probabilities. The origin of the fire then being first proven, the burden is upon the defendant to show that he used all necessary precaution to avoid such mischief. *Shearman & Redfield on Neg.* 33; 28 Ill. 9; 42 id. 407; 3 C. B. 229; 2 Ired. Law, 138. This, says a learned writer, is the rule which is supported by the best authorities, and which seems to be just. "The natural presumption would be that by the use of ordinary care engines could be constructed so as to avoid such consequences, and if that is so, a presumption of negligence arises from their not being so constructed." This rule, as to the burden of proof, says this court, in *Horne v. M. & O. R. Co.*, 1 Cold. 75.

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was applied to railroad companies in *Carpue v. London & Brighton R. Co.*, 5 Q. B. 747, and also in *Skinner v. London & Brighton R. Co.*, 2 Eng. Law & Eq. 360. So also *Ellis v. Portsmouth & Roanoke R. Co.*, 2 Ired. 138, which latter case was one of damage to the plaintiff's fence by a fire caused by a spark emitted from the defendant's engine. In *Christie v. Griggs*, 2 Camp. 79, it was held that proof of injury to the plaintiff threw upon the defendant the burden of showing that he exercised all the care which he was bound to do. And it was said by WRIGHT, J., in *Horne v. M. & O. R. Co.*, 1 Cold. 74, that the statutory rule, that after it has been established by evidence on the part of the plaintiff that his stock has been killed or injured by the railroad company, the *onus probandi* is thrown upon the defendant. We do not understand it to be new, it is simply the announcement of a common-law principle. We hold therefore that the court below was not in error in withholding the instructions requested.

[The remainder of the opinion is immaterial.]

Judgment reversed and a new trial granted.

NOTE.—See to same effect *Atchison, Topeka & Santa Fe R. R. Co. v. Stanford*, 15 Am. Rep. 362; *Clemens v. The Hannibal, etc., R. R. Co.*, 14 id. 460; *Spaulding v. Chicago & Northwestern R. R. Co.*, 11 id. 550. See contra, *Gandy v. The Chicago & Northwestern R. R. Co.*, 6 id. 682.

 PHADENHAUER V. GERMANIA LIFE INSURANCE COMPANY.

(7 Heisk. 567.)

Insurance — life-policy, condition against suicide.

A life insurance policy contained a clause rendering the same void if the assured "shall die by suicide or by his own hands." Held, that the condition referred to the voluntary act of the assured when he was capable of distinguishing right from wrong; but if the act was committed by him when incapable of so distinguishing, the policy would not be avoided. (See note, p. 628.)

ACTION by Mary Phadenhauer upon a life insurance policy. The facts fully appear in the opinion.

M. M. Brien, Jr., for plaintiff.

John Ruhm, for defendant.

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NICHOLSON, C. J. Plaintiff is the widow of Andrew Phadenhauer, who committed suicide in Nashville in 1868. She sues the defendant for one thousand dollars, the amount for which his life was insured by defendant. The contract of insurance contains a clause by which the policy is void, if the assured "shall die by suicide, or by his own hands." Upon the trial in the Circuit Court of Davidson county the plaintiff introduced proof to show that the assured was insane at the time of his suicide, for the purpose of avoiding the above recited clause in the contract. Under the charge of the Circuit Judge the jury found a verdict for the defendant. The plaintiff has appealed.

The error relied on for a reversal is assigned upon the charge of the Circuit Judge. After instructing the jury correctly as to the legal definition of suicide, the judge said: "You will therefore look to the proof, and see whether the deceased was insane at all; if so, whether he was insane at the time of killing himself; and if so, whether he was so insane at the time of the act as not to have capacity to discern right from wrong; for to constitute suicide, it is not sufficient that he had mind enough to know that means employed to destroy life would produce the result; he must have had mind enough to know that in a religious and moral point of view it was wrong. If he had not that much mind at the time of committing the act, he was incapable of committing suicide, and the contract will not be void by reason of the proviso." After thus instructing the jury in regard to insanity as applicable to a case of suicide, he next proceeds to discuss the meaning of the words, "die by his own hands," used in the contract. He tells the jury that these were not used in the contract as synonymous with "suicide," but were intended to cover some case that would not amount to technical suicide. He says: "It was intended to extend to all cases where the party had mind enough, and sufficient knowledge of physical laws to know that the means he employed would produce death, and were employed with that intent, though the obliquity of his mind might be such as not to understand that it was a crime."

After giving ample illustrations of his meaning, he concludes: "I am of opinion, therefore, that the terms 'suicide' or 'by his own hands' embrace all cases of voluntary self-destruction where the party does the act voluntarily with the intent to kill himself, and has intelligence enough at the time to know that the means employed will produce that result, whatever may be the moral condition of his mind as to its perception of right and wrong; further than that, I think neither of the terms, nor both of them together, extend." "On the other hand," he continues, "if the party is so insane that he knows not what he is about, or if his

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imagination is haunted by frightful spectres, so that he jumps out of a high window to escape them and is killed, etc., and a thousand other cases that might be supposed where the death is the work of his own hands, but at the same time an involuntary act into which he has been madly drawn by the frenzy of the moment, not knowing or understanding the danger on which he is rushing, and neither willing nor intending to produce the result; in none of these cases would he be guilty of suicide, or death by his own hands, within the meaning of the contract." If we comprehend this charge, the judge intended to instruct the jury, first, that if the deceased had mind enough to know that the means employed would produce death, but did not have mind enough to know that his act was morally wrong, he was not guilty of suicide, and therefore the contract of insurance was not void for suicide. Second, that if the deceased had mind enough to know that the means he employed would produce death, and these means were employed with that intent, but through obliquity of mind he did not understand that his act would be criminal, this would be the taking of his life "by his own hands," within the meaning of the contract, and therefore in that case the contract would be void. And third, that if the deceased was so insane as not to know what he was about, but was driven madly and involuntarily to the taking of his own life, without intending it, he would not be guilty of suicide, or of taking his life with his own hands, in the sense of the words as used in the contract, and therefore in that case the contract of insurance would not be void.

The first duty that devolves upon us is to ascertain the true meaning and intention of the parties to the contract of insurance; and in doing this, it will be necessary to determine whether the Circuit Judge's construction thereof is correct. By the terms of the contract, the defendant, for a specific consideration to be paid semi-annually by the deceased, agreed to pay to him \$1,000 on the 25th of May, 1881, or within sixty days after due notice and proof of his death, should he die previously. But upon this, among other conditions, "that if the person aforesaid shall die by suicide, or by his own hand, or in consequence of an attempt to commit suicide, or to take his own life," etc., the policy shall cease and be void.

The obvious intention of the defendant was to provide against liability if the assured should voluntarily destroy his own life; and it was the intention of the assured to create no claim on the defendant if he should destroy his own life. To effectuate this intention, the language used was: "If he shall die by suicide or by his own hand."

The parties had in their minds the single idea of voluntary self-

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destruction, and to express it they first used the words "suicide;" and by way of explanation, they add "or by his own hand," meaning by the latter words to define more specifically what they meant by "suicide," and meaning by both expressions the voluntary self-destruction of the assured. That the two expressions — die by suicide, and die by his own hands — are synonymous in their meaning, has been determined in numerous cases. In *Hartman v. Keystone Insurance Company*, 21 Peun. 466, Judge BLACK held that the words "die by his own hands," standing alone, mean any kind of "suicide." In *Dean v. American Mutual Life Insurance Company*, 4 Allen, 96, the Supreme Court of Massachusetts defined the same words to mean "the destruction of life by the voluntary and intended act of the party assured."

In *Breasted v. The Farmers' Loan and Trust Co.*, 4 Hill, 74, Judge NELSON adjudged that "suicide" and "die by his own hands" as generally used in policies, were synonymous, and that "die by his own hands" means voluntary self-destruction by the free will of a sane man. Upon reason and authority, therefore, we conclude that the two expressions, "die by suicide" and "by his own hands," were used by the parties as synonymous, and intended to convey the distinct idea of self-destruction. We are therefore of opinion that while the charge of the Circuit Judge may have given to the jury the literal meaning of the words used by the parties, yet, in laying down the distinction between dying by suicide and by his own hand, he may have misled the jury, and made an impression on them not intended.

The proof makes a clear case of suicide or voluntary self-destruction of life. The deceased was found dead in his stable, hanging by a rope to a post. That he took his own life, and that he did it voluntarily, was not contradicted.

The only question in issue was, whether he was sane or insane at the time of committing the suicide? If insane, the question of law was presented, whether the contract of insurance was thereby made void?

The English rule on this question seems to be fully stated in the case of *Borrodaile v. Hunter*, 44 Eng. Com. Law, 336, in which Justice ERSKINE said: "Looking simply at that branch of the *proviso*, upon which the issue was raised, it seems to me that the only qualification that a liberal interpretation of the words with reference to the nature of the contract requires, is that the act of self-destruction should be the voluntary and willful act of the man, having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by the act; and that the question whether at the time he was

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capable of understanding and appreciating the *moral nature and quality* of his purpose is not relevant to the inquiry, further than it might help to illustrate the extent of his capacity to understand the act itself."

The English doctrine recognizes the general principle laid down in 4 Black. Com. 189; 1 Hale's Pl. C. 411, that "self slaughter by an insane man or a lunatic is not an act of suicide within the meaning of the law;" but it confines insanity or lunacy to a defect of the powers of the mind and reason to understand the physical nature and consequences of the act, ignoring the incapacity of the mind or reason to understand the moral nature and consequences of the act.

It is difficult to reconcile this position with sound reason. If a man may not be a suicide because he lacks sufficient mind to understand the physical nature of his act, we do not see why he may not be denied to be a suicide because he lacks sufficient mind to understand the moral nature of his act. The American authorities are conflicting on this question, but we think the decided preponderance is on the side of those which hold that if a man has not mind enough to understand the moral nature of the act of self-destruction — in other words, if he is incapable of distinguishing between right and wrong — he cannot be a suicide.

To constitute an act suicidal, it must not only be voluntary, but it must be the act of one capable of distinguishing right from wrong. It cannot be controverted that there is such a thing as moral insanity, as well as mental insanity. When a clear case of moral insanity is made out, it ought to be as conclusive in excusing the party from crime as when a clear case of mental insanity is made out.

This is the view of the question adopted in most of the American authorities, and we have adopted it in a criminal case, at the present term, as most consistent with sound reason and humanity.

As suicide is a crime of the highest grade we see no reason why the rule should not be applied to that crime. There is danger that this rule may be abused, but this fact only increases the responsibility which rests upon the courts and juries to confine the doctrine only to cases where the moral insanity is satisfactorily established by clear proof. The law raises no presumption of insanity from the act of self-destruction. When proof is made showing that the deceased died by suicide, it follows by the terms of the contract that the defendant was not liable.

It then devolves on the plaintiff to prove the insanity of the deceased at the time of the suicide, in order to relieve the act of self-destruction from the consequences of avoiding the contract. In the case of *Terry v. Life Insurance Company*, 1 Dill, 403, tried in the United States Circuit Court for Kansas, at the May Term, 1871, Justice MILLER and Judge

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DILLON presiding, Justice MILLER in his charge to the jury said : " It is not every kind or degree of insanity which will so far excuse the party taking his own life, as to make the company insuring liable. To do this, the act of self-destruction must have been the consequence of insanity, and the mind of the deceased must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing.

If he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist ; or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other hand, there is no presumption of law *prima facie* or otherwise, that the self-destruction arises from insanity ; but if you believe from the evidence that the deceased, although excited or angry, or distressed in mind, formed the determination to take his own life because in the exercise of his reasoning faculties he preferred death to life, then the company is not liable, because he died by his own hand within the meaning of the policy."

This charge was made by Justice MILLER, after a review of all the authorities, and we think it may be regarded as a succinct and comprehensive, but correct, exposition of the law of the case. Without attempting the impracticable task of laying down the distinction between mental and moral insanity, or stating how far they are necessarily commingled, he leaves the jury to determine from the proof whether at the time of taking his life the deceased was capable of forming a rational judgment in regard to the act he was committing.

For the error indicated in the charge of the Circuit Judge, the judgment is reversed, and the cause remanded.

Ordered accordingly.

NOTE.—See *Cooper v. Massachusetts Life Ins. Co.*, 3 Am. Rep. 451, and note ; *Mallory v. Travelers Ins. Co.*, 7 id. 410, and note ; *Equitable Life Ins. Co. v. Paterson*, 5 id. 535 ; *Van Zandt v. Mutual Benefit Life Ins. Co.*, 14 id. 215.

In *Bigelow v. The Berkshire Life Ins. Co.*, decided at the October term, 1876, the Supreme Court of the United States decided that a condition in a life insurance policy that the policy should be void if the insured should die by suicide, "sane or insane," avoids the policy in case the insured died by his own hand, notwithstanding he was of unsound mind and wholly unconscious of the act. The opinion of the court, delivered by Mr. Justice DAVIS, was as follows :

" This is an action on two policies issued by the defendant on the life of Henry W. Bigelow. Each contained a condition in avoidance, if the insured should die by suicide, *sane or insane*, and in such case the company agreed to pay to the party in interest the surrender value of the policy at the time of the death of Bigelow. The defendant plead that Bigelow died from the effects of a pistol-wound, inflicted upon his person by his own hand, and that he intended by this means to destroy his own life. To this the

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plaintiffs replied, that Bigelow, at the time when he inflicted the pistol-wound upon his person by his own hand, was of unsound mind and wholly unconscious of the act. The defendant filed a demurrer to this replication, which was sustained by the court below, and the plaintiffs bring the case here for review.

“ There has been a great diversity of judicial opinion upon the question, whether self-destruction by a man, in a fit of insanity, is within the condition of a life policy, where the words of exemption are that the insured ‘shall commit suicide’ or ‘die by his own hand,’ which is only another form of expression for suicide. But since the decision in *Life Insurance Company v. Terry*, 15 Wall. 580, the question is no longer an open one in this court. In that case the words avoiding the policy were, ‘shall die by his own hand,’ and we held that they referred to an act of criminal self-destruction and did not apply to an insane person who took his own life. But the insurers in this case have gone further, and sought to avoid altogether this class of risks. If they have succeeded in doing so, it is our duty to give effect to the contract, as neither the policy of the law nor sound morals forbid them to make it. If they are at liberty to stipulate against hazardous occupations, or unhealthy climate, or death by the hands of the law, or in consequence of injuries received when intoxicated, surely it is competent for them to stipulate against an intentional act of self-destruction, whether it be the voluntary act of a moral agent or not. It is not perceived why they cannot limit their risks in any manner they see fit, provided the assured is told in proper language of the extent of the limitation, and it is not against public policy. The language of this stipulation is, shall ‘die by suicide (sane or insane).’ These words must receive a reasonable construction. If they be taken in their strictly literal sense, their meaning might admit of discussion, but it is obvious they were not so used. ‘Shall die by his own hand, sane or insane,’ is, doubtless, a more accurate mode of expression, but it does not more clearly declare the intention of the parties. Besides, the authorities uniformly treat the terms ‘suicide’ and ‘dying by one’s own hand,’ in policies of life insurance, as having the same meaning, and the popular understanding accords with this interpretation. TINDALL, Chief Justice, in *Borrodale v. Hunter*, 5 Mann. & Grang. 668, says: ‘The expression, ‘dying by his own hand,’ is, in fact, no more than the translation into *English* of the word of *Latin* origin, ‘suicide,’ and he construed the terms as synonymous. Life insurance companies, in adopting one phrase or the other, have used them without distinction as conveying the same idea. If the words, ‘shall commit suicide,’ standing alone in a policy, import self-murder, so do the words, ‘shall die by his own hand.’ Without qualification, they mean in legal contemplation the same thing, and when accompanied by qualifying words the same construction must be adopted, whether the general words consist of either mode of expression. This being so, there is no difficulty of defining the sense in which it was intended the language of this condition should be received. Felonious suicide was not alone in the contemplation of the parties to it. If it had been, there was no necessity of adding any thing to the general words. These had been construed by many courts of high authority to exclude self-destruction by an insane man. Such a man could not commit felony, but he could take his own life with a set purpose to do so, conscious of the physical nature of the act, but unconscious of the criminality of it. As the line between sanity and insanity is often shadowy and difficult to define, this company thought proper to take the subject from the domain of controversy, and by stipulation exclude all liability by reason of the death of the party by his own act, whether he was at the time a responsible moral agent or not. Nothing can be clearer than that the words ‘sane or insane’ were introduced for the purpose of excepting from the operation of the policy any intended self-destruction, whether the insured was of sound mind or in a state of insanity. These words have a precise, definite, well-understood meaning. No one could be misled by them, nor could an expansion of this language more clearly express the intention of the parties. In the popular, as well as in the legal sense, suicide means, as we have seen, the death of a party by his own voluntary act, and this

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condition, based, as it is, on the construction of the language, informed the holder of the policy that if he purposely destroyed his own life the company would secure exemption from liability. It is unnecessary to discuss the various phases of insanity in order to see whether a possible state of circumstances might not arise which would defeat the condition. It will be time to decide this question when such a case is presented. For the purposes of this suit it is enough to say, that if the assured be conscious of the physical nature of the act he is committing, and intended by it to cause his death, the policy is avoided, although, at the time, he was incapable of judging between right and wrong, and did not understand the moral consequences of what he was doing. Any other construction would deny to the insurance companies the right to declare the sense in which they used words of limitation in their policies.

"These companies have only recently inserted in the provisos to their policies, words of limitation corresponding to those in this case, and for this reason there has been but little occasion for courts to pass upon them. But the direct question presented here was before the Supreme Court of Wisconsin in 1874 (34 Wis. 389), and received the same solution we have given it. It is true in that case there were more words used than are contained in this proviso, but the effect is the same as if they were omitted. To say that the company will not be liable if the insured shall die by 'suicide, felonious or otherwise,' is the same thing as saying if he shall die by "suicide, sane or insane." They are equivalent phrases, and the use of both was, doubtless, to intensify the meaning of the parties. Neither the reasoning nor opinion of the court is at all affected by the introduction of words which are not common to both policies.

"It remains to be seen whether the court erred in sustaining the demurrer. The replication concedes in effect all that is alleged in the plea, but it avers that the insured at the time 'was of unsound mind, and wholly unconscious of the act.' These words are identical with those in the replication to the plea in *Breasted v. The Farmers' Loan and Trust Company*, 4 Hill, 73, and Judge NELSON treated them as an averment that the assured was insane when he destroyed his life. They can be treated in no other way. If the self-destruction was not intended, the replication would have said so. Instead of this, it confessed that fact and avoided its supposed effect by setting up a state of insanity. The phrase, 'wholly unconscious of the act,' refers to the real nature and character of the act as a crime, and not to the mere act itself. Bigelow knew that he was taking his own life, and showed sufficient intelligence to employ a loaded pistol to accomplish his purpose, but he was unconscious of the great crime he was committing. His darkened mind did not enable him to see or appreciate the moral consequences of his act, but still left him capacity enough to understand its physical nature.

"Enough has been said to show, in the view we take of the case, that the court did not err in holding that the replication was bad.

"The judgment is affirmed."

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

McCLARY v. THE SIOUX CITY AND PACIFIC RAILROAD COMPANY.

(8 Neb. 44.)

Carrier of passengers — railroad — running behind time — proximate cause.

A railroad train, running three-quarters of an hour behind time, was upset by a gust of wind and plaintiff was injured. The wind did not extend to that part of the road where the train would have been if running on time. *Held*, that the negligence of the company in running behind time was not the proximate cause of the injury and that it was not liable therefor.

PETITION in error to review the judgment of a District Court.
The opinion states the case.

H. Wakely and Munger & Ghost, for plaintiff in error.

Isaac Cook and N. M. Hubbard, for defendants in error.

MAXWELL, J. The petition in this cause states that the defendants "are a corporation operating and running a certain railroad in the State of Nebraska, between the city of Fremont, in the county of Dodge, to some point in the county of Cuming, at or near the town of West Point, in said county, and that said defendant was a common carrier of passengers in cars over and upon said railroad, for hire and reward: and thereupon the said plaintiff on the 5th day of July, 1871, at the special instance and request of the said defendant, became and

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was a passenger on the said railroad of the said defendant aforesaid, and in the cars thereof, to be safely carried from Fremont, Nebraska, to West Point, for a certain hire and reward paid to the said defendant in that behalf, and the said plaintiff was then received by the said defendant in the cars and on the road aforesaid as such passenger, to be carried thereby as aforesaid; yet the defendant not regarding its duties in that behalf, did, by its agents, negligently conduct the running of its said train of cars over said railroad, in which plaintiff was a passenger, out of the regular, usual, and advertised time for running such cars between the places aforesaid, and did run their said cars, in which plaintiff was a passenger, out of such regular, usual, and advertised time, and were at the time of committing the injuries hereinafter complained of, running about three-fourths of an hour behind the regular, usual and advertised time of the running of the same, and were at a point on said railroad at the time of committing the injuries herein complained of, several miles away from the place where such cars would have been at the time, had they been running the same on the regular, usual, and advertised time of running said cars, and because thereof were suddenly and violently thrown from the track by a sudden gust of wind which crossed that part of the track, but not the part of the track where the said cars would have been if the train had been running on its usual, ordinary, and advertised time, upsetting the car in which plaintiff was seated, thereby greatly injuring plaintiff by her being badly cut and bruised, and became sick, lame, and unable to walk, and was wholly unable to attend to the transaction of her necessary business to the present time, to her damage in the sum of ten thousand dollars."

The defendant demurred to the petition on the ground:

"*First.* That there is no law requiring defendant to run its cars on its usual and advertised time.

"*Second.* It is not shown by the petition that defendant's train at the time of the injury complained of was behind its usual and advertised time, through any negligence of defendant, or its servants or agents.

"*Third.* The damages claimed are remote and consequential and not the probable or natural consequences to be apprehended from the negligence alleged by plaintiff."

The Code provides that the defendant may demur to the petition only when it appears upon its face,—

First. That the court had no jurisdiction.

Second. That the plaintiff has not legal capacity to sue.

Third. That there is another action pending between the same parties for the same cause.

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Fourth. That there is a defect of parties plaintiff or defendant.

Fifth. That several causes of action are improperly joined.

Sixth. That the petition does not state facts sufficient to constitute a cause of action.

The objections stated in the demurrer not being any of those provided by the Code, can only be considered as a general demurrer "that the petition does not state facts sufficient to constitute a cause of action." General Statutes, §§ 95, 540.

The demurrer was sustained by the District Court, and judgment of dismissal entered, to review which, the cause is now brought here.

The general rule is, that even a wrong-doer is liable only for the proximate consequences of his act or default, and this rule is certainly applicable to cases of mere negligence. Injuries caused only remotely by reason of negligence cannot be charged to the party in fault. It is contended in this instance that while the injury was occasioned by the act of God, yet had the train been running on time, the accident would not have occurred, therefore the negligence of the defendant, in permitting the train to be three-fourths of an hour behind time, is the proximate cause of the accident. Common carriers of goods are not only responsible for any loss or injury to the goods they carry, but the law raises an absolute and conclusive presumption of negligence whenever the loss occurs from any other cause than the act of God or the public enemy.

In the case of *Forward v. Pittard*, 1 Term, 27, in which the plaintiff's goods, while in possession of the defendant as a common carrier, were consumed by fire, it was found that the accident happened without any actual negligence in the defendant, but that the fire was not occasioned by lightning. The court held that "a carrier is in the nature of an insurer. It is laid down that he is liable for every accident except by the act of God, or the king's enemies."

To prevent litigation the law presumes against the carrier unless he shows it was done by the king's enemies, or by such an act of God as could not happen by the intervention of man. And it is held that if the carrier wrongfully delay the transportation of goods, and because of the delay they are injured by a flood, the carrier would be liable. *Lowe v. Moss*, 12 Ill. 477; *Reed v. Spaulding*, 30 N. Y. 630. This is the law as to common carriers of goods, and it is contended by the plaintiff that the same rule applies to common carriers of passengers. As a rule the liability of the common carrier of goods does not depend upon his negligence, because he insures the owners of all the goods he carries against all loss or injury, not caused by the act of God or the public

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enemy. The exception to this rule the case of the carrier of passengers is, that he is liable *only* where the injury has arisen from his own negligence; he does not warrant the safety of passengers, but as far as human care and foresight go, he will provide for their safe conveyance: but if he is in the least degree negligent he is liable, because the law requires him to do all that care and skill can do for the safety of his passengers.

The only negligence alleged in the petition is, that the train was three-fourths of an hour behind the regular and advertised time, and it is contended by plaintiff that that of itself is such an act of negligence as entitles the plaintiff to recover. While it was the duty of the defendant to have adopted such rules and regulations for the running of their trains, as would insure the safety of their passengers, and having adopted them, must conform thereto as far as possible, or be responsible for the consequences resulting therefrom, yet they are responsible only for such damages as are the natural and direct result of the act complained of. Redfield on Railways (2d ed.), § 154: *Dunton v. Great Northern Railway*, 34 Eng. Law Equity, 154.

In this case the injury complained of, not being the natural result of the train being behind time, is too remote to entitle the plaintiff to recover. All the justices concurring the judgment of the District Court is affirmed.

Judgment affirmed.

PEOPLE *ex rel.* TENNANT V. PARKER.

(3 Neb. 409.)

Legislature—convening in extra session—revocation of proclamation.

The Governor of a State being temporarily absent therefrom, the person upon whom the Constitution devolved the duties of that office in case of the Governor's absence, issued a proclamation convening the legislature in extraordinary session. The Governor, returning before the day named for the session, revoked the proclamation. *Held*, that such revocation was lawful, and that any act done by the legislature assembled under the proclamation was void.

WRIT of *habeas corpus* to Delas Parker to inquire into his authority to hold the relator. The facts were as follows:

The Governor of Nebraska having been impeached and removed from office, W. H. James, who was elected Secretary of State at the same

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time and for a like term with the Governor, became, and during the time hereinafter mentioned, was Acting Governor of the State. During the same time Isaac S. Hascall was a State Senator, and at an adjourned session of the legislature was elected President of the Senate.

Acting Governor James left in February, 1872, to attend to business of the State at Washington. Hascall, learning of James' absence, went at once to Lincoln, the capital, and obtained from James' private secretary the Great Seal, long enough to get its impress to a paper, of which the following is a copy, and which was published in some of the papers of the State :

"In accordance with the provisions of the Constitution of the State of Nebraska, and by virtue of the authority vested in the Governor to convene the legislature by proclamation on extraordinary occasions, and as the occasion contemplated by the Constitution now exists, it being necessary to have immediate legislation to encourage and promote immigration, to improve the finances of the State, and for other purposes that more fully appear in the subjects of legislation hereinafter contained, I, Isaac S. Hascall, President of the Senate and Acting Governor of the State of Nebraska — a vacancy existing in the office of Governor, and the Secretary of State being absent from the State — do hereby convene the legislature, and call upon the members thereof to meet at the capitol, in the city of Lincoln, on Thursday, the fifteenth day of February, A.D. 1872, at 3 o'clock P. M., for the purpose of taking action upon the following subjects of legislation : " We omit the subjects.

Acting Governor James being advised of what had been done by Hascall, returned at once to the State, and put forth his proclamation, revoking, rescinding, and annulling the proclamation of the President of the Senate, and requesting and enjoining the members of the legislature not to meet at the capitol in pursuance of said call on the 15th day of February, 1872.

The sections of the Constitution upon which it was presumed to base these several proceedings, are found under the title of Executive, and are as follows :

"SEC. 9. He (the Governor) may, on extraordinary occasions, convene the legislature by proclamation, and shall state to both houses, when assembled, the purpose for which they have been convened."

"SEC. 16. In case of the impeachment of the Governor, his removal from office, death, resignation, or absence from the State, the powers and duties of the office shall devolve upon the Secretary of State, until such disability shall cease, or the vacancy be filled."

"SEC. 17. If during the vacancy of the office of Governor, the Sec-

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retary of State shall be impeached, displaced, resign, die, or be absent from the State, the powers and duties of the office of Governor shall devolve upon the President of the Senate, and should a vacancy occur by impeachment, death, resignation, or absence from the State, of the President of the Senate, the Speaker of the House of Representatives shall act as Governor till the vacancy be filled."

At the time fixed by the first proclamation, several members met at Lincoln. More remained away, disclaiming any authority to meet as a legislative body. Those who gathered were discountenanced by Acting Governor James, who refused them admission into the legislative halls. They, however, overcame his resistance, and, taking possession, proceeded to organize. Parker was appointed, among others, as a sergeant-at-arms for the Senate, and ordered to arrest and bring in absentees. Under this order he claimed to hold the relator, Tennant.

M. H. Sessions and *E. Wakeley*, for the relator.

E. E. Brown, *Seth Robinson* and *Isaac S. Hascall*, *contra*.

LAKE, J. This case presents at least two important questions for the consideration of the court. They are not only important, but so novel in their character, that ordinary sources of legal information afford us but a dim light to direct us in our investigations.

So true is this, that even the learned counsel upon both sides, who have argued the case with their customary ability, and who usually fortify their positions with apt adjudged cases, have been compelled to admit their inability to find in the books of reports a single case wherein these precise questions or even those strongly analogous thereto have been determined by the courts.

The questions to be considered are, first, was Isaac S. Hascall, as President of the Senate, authorized to issue his proclamation for the convening of the legislature; and second, if he was so authorized, could Secretary James, in the exercise of his functions as acting Governor of the State, revoke such proclamation and thereby prevent the convening of that body in legal session? If the court shall consider either, that, under all the circumstances, the President of the Senate had no authority to act in the premises, or being authorized to act, what he did may be annulled, the imprisonment of the relator is illegal and he must be released therefrom.

Upon the first proposition my own mind is not clear. I can say, however, when the question was first presented to me I was strongly inclined to the opinion insisted upon for the respondent, that so soon as the Gover-

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nor sets his foot beyond the limits of our State, the officer next in succession therein, may at once assume all the authority, and exercise all or any of the duties pertaining to the executive department of government. But when I reflect upon the possible consequences of such a construction of the Constitution, upon the disgraceful tricks, strifes and exhibitions, which might be entailed upon the people of the State, of which our present attitude presents a sad and humiliating commentary, I am induced to hesitate and cast about me for a more salutary rule, one which, while it will insure the efficient administration of the affairs of State during a brief temporary absence of the executive, will at the same time protect this department of the government against unnecessary and ill-advised intrusion.

The conclusion to which a majority of the court have arrived on the second question will enable us to decide the case before us, without further notice of this one. I shall take occasion hereafter, however, to examine it more at length.

Admitting, however, that the exigency existed, by the temporary absence of the then acting Governor from the State, for the assumption of executive authority by the President of the Senate, and that in pursuance of the provisions of the Constitution he duly issued his proclamation for the convening of the legislature in extra session, is the issuance thereof of such an act when done, entirely beyond executive control?

The Constitution provides for the regular sessions of the legislature. These can be held at no other time. But the necessity and propriety of their assembling oftener than at these stated periods is left by the Constitution entirely to executive discretion.

This discretion is wisely lodged in the Governor of the State, who is presumed, to be well advised when an extraordinary occasion has arisen which demands prompt legislative action.

With the exercise of this discretion up to the time of convening the legislature no one can interfere. The whole matter is left entirely to the will of him who, for the time being, is invested with the executive authority of the State.

But if, for any good and sufficient reason, the executive shall become satisfied that the necessity which induced the call has passed, or that it was unadvisedly made, it is not only his right, but his duty to revoke the same, that the people may be saved the expense which would otherwise be laid upon them.

Nor does it matter whether the revocation be by the same person who issued the proclamation or not, so long as he is for the time being in the legitimate exercise of the executive functions of the government.

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It is not the act of the individual strictly speaking, but of the executive, in which there is, in one sense, no *interregnum*.

In this case it is shown that the Secretary of State, in the legitimate exercise of the authority invested in that officer, has declared that the proclamation theretofore issued for the convening of the legislature was ill-advised; that in fact no extraordinary occasion had arisen rendering it necessary for the legislature to assemble in extra session, and therefore he revoked the same.

I am clearly of the opinion that the legislature is not now in legal session, and has no authority to compel the attendance of absent members; that all and every act done at this time, as a legislative body, is without the shadow of authority and absolutely void, and that, therefore, the relator should be released from custody.

This conclusion being also concurred in by my brother CROUNSE, it is so ordered.

MASON, Ch. J., delivered a dissenting opinion.

WEBB v. HOSELTON.

(4 Neb. 308.)

Mortgage — given to secure note — right of indorses of note.

THE *bona fide* purchaser for value of a negotiable note secured by mortgage, before maturity and without notice, takes the mortgage as he does the note, discharged of all equities between the original parties.

ACTION by Betsy Webb against Hoselton and others, to have a certain note executed by plaintiff to Hoselton and indorsed by him to the other defendants, and a mortgage and deed of trust given to secure said note, declared void.

The referee who tried the case reported that the plaintiff executed the note and mortgage in question to secure the payment of \$1,150, and also that she gave a deed of trust upon the same premises upon which the mortgage was given to secure the note, the mortgage to be thereupon canceled; that immediately after the deed of trust was given, the note, which it was given to secure, was indorsed by Hoselton and transferred before it became due to the defendants Monell and Lashley, for a valuable consideration, without any notice of any defense, and the note

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and trust deed were delivered to Monell and Lashley as their property ; that the plaintiff was a married woman when she gave the note, mortgage and trust deed ; that part of the consideration for which the note was given had failed, and that the plaintiff was entitled to have the note surrendered up and the mortgage and trust deed canceled.

Exceptions to the report were sustained and the petition dismissed.

Tuttle & Harwood, Groff & Ames, and E. C. Brown, for plaintiff in error.

Lamb & Billingsley, for defendants, Monell and Lashley.

MAXWELL, J. [After declaring that the note of a married woman given in a transaction relating to her separate business was valid under the statute.] The referee finds that Monell and Lashley purchased the note and mortgage before maturity and without notice.

In *Bailey v. Smith*, 14 Ohio St. 413, the court held that "mortgages were mere choses in action, whether standing alone or taken to secure negotiable or non-negotiable paper ; that they are only available for what is honestly due from the mortgagor to the mortgagee." And the courts of Illinois hold substantially the same doctrine.

In *Harkrader v. Lieby*, 4 Ohio St. 603, the court held, "it is incorrect to say that a mortgage does no more than create a lien on the property. It operates as a conveyance of the estate by way of pledge or security for the debt, and gives the mortgagee the benefit of all the doctrines applicable to *bona fide* purchasers." This is holding in effect that the mortgagee has an estate in the mortgaged premises during the continuance of the mortgage.

The ancient equity practice, and which continued in England until about the year 1845, was to file a bill for strict foreclosure, whereby a decree was obtained for the payment of the mortgage debt within a short period, to be fixed by the court, in default whereof the mortgagor and all persons claiming under him were barred and foreclosed of all right and equity of redemption, and the estate became the property of the mortgagee in the character of purchaser. And the court, except in special cases, refused to decree a compulsory sale against the will of the mortgagor, but courts of equity were in the habit of enlarging the time to redeem, according to the equity arising from circumstances. 2 Van Santvoord's Eq. 70 ; 4 Kent's Com. 181 ; Story's Eq., § 1026. And this practice seems to have prevailed in the New England States. 4 Kent's Com. 181. See, also, *Higgins v. West*, 5 Ohio, 555. And as

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between the mortgagor and mortgagee, and those claiming under them, after condition broken, the estate became absolute in the mortgagee, subject, however, to be redeemed at any time before foreclosure. A non-negotiable bond in many cases appears to have accompanied the mortgage, but as a suit on the bond for the deficiency opened the decree, and permitted the mortgagor to redeem, there seems to have been but little inducement to bring such an action. *Dashwood v. Blythway*, 1 Eq. Cases, 317; *Perry v. Barker*, 13 Ves. 193; *Lovell v. Leland*, 13 Vt. 581; Rev. Stats. Mass. 1835. Contra, *Lansing v. Goelet*, 9 Cow. 346.

In *Howard v. Harris*, 1 Vern. 190, the mortgage contained a covenant to pay £1000 on the — day of —, 1866, and £60 per annum interest, in the meantime, by half-yearly payments from the date of the mortgage. It was afterward held that the omission of the covenant was immaterial. 1 P. Wms. 271; 3 id. 358; 2 Atk. 496.

Promissory notes payable to bearer or order were made negotiable by statute in the year 1704 (3 and 4 Anne, ch. 9), but do not appear to have been used to any extent in connection with mortgages until the present century.

In States like Ohio, where it is held that after condition broken the legal estate is vested in the mortgagee, a mortgage may perhaps be properly regarded as a chose in action, and available only for what is honestly due from the mortgagor to the mortgagee. *Bailey v. Smith*, 14 Ohio St. 413; *Allen v. Everly*, 24 id. 97; *Fische v. Kramer's Lessee*, 16 Ohio. 126; *Maynard v. Hunt*, 5 Pick. 243; *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306; *Frothingham v. McKusic*, 24 Me. 403.

But in this State the mortgagee is not seized of the freehold, either at law or in equity, even after condition broken. The mortgagor retains the legal title, and is entitled to the possession, which he may retain until the sale is confirmed. The mortgage is a mere incident to the debt and passes with it, and nothing whatever passes by an assignment of the mortgage, without the note or debt. If a note is negotiable, as in this instance, and transferred before maturity for a valuable consideration, without notice of any defense, the assignee takes it, and the security, free from equities between the original parties. *Kyger v. Ryley*, 2 Neb. 28; *Carpenter v. Longan*, 16 Wall. 271; *Pierce v. Faunce*, 47 Me. 507; *Potts v. Blackwell*, 4 Jones' Eq. 58; *Fisher v. Ottis*, 3 Chandler, 83; *Reeves v. Sculley*, Walk. Ch. 248.

The case of *Mathews v. Wallwyn*, 4 Ves. 118, has no application to this case; had the note been non-negotiable or overdue at the time of the transfer, it would have been subject to equities between the original parties

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The fact that the mortgage in this instance is in the form of a deed of trust does not change its character from a mere security for the payment of money, nor does it convey the legal title, nor do the restrictions therein contained prevent the plaintiff from availing herself of the safeguards thrown around the debtor to prevent a sacrifice of her property. The judgment of the court below as to Monell and Lashley is affirmed. It is apparent from the finding of the referee that the defendant Hoselton took advantage of the plaintiff's ignorance in obtaining the note and mortgage (if he is not guilty of actual fraud), but no relief can be afforded the plaintiff in this form of action. The petition against Hoselton is therefore dismissed without prejudice.

Judgment accordingly.

STATE *ex rel.* THE ATCHINSON, ETC., RAILROAD COMPANY v. THE
BOARD OF COUNTY COMMISSIONERS.

(4 Neb. 537.)

Constitutional law — tax on litigation.

The Constitution authorized the legislature to tax certain specified business classes, among which litigants were not included. *Held*, that its power to tax was not limited to the classes named, and that a statute imposing a tax upon one commencing a suit at law was constitutional.*

MOTION for an order of the court requiring the clerk to file and enter upon the appearance docket, and other proper records, the application of the relator for a writ of *mandamus* against the defendants. The grounds for the motion were that the clerk had refused to file the application, unless the relator paid the fee of ten dollars imposed by the provisions of section 26, of chapter 22, of the General Statutes of 1873, entitled "Fees."

These sections of that chapter were enacted in 1867, in pursuance of a clause contained in the Constitution then in force, and providing that the amount so taxed should be held as a judiciary fund, to be applied in payment of the salaries of the justices of the Supreme Court. Constitution of 1867, art. IV, § 7. The statute itself does not provide that the tax thus imposed shall be used for the payment of the salaries of the judges, and the judiciary fund and its disposition only existed by virtue of the constitutional provision just mentioned. By virtue of the

* See *Harrison v. Willis*, ante, p. 604.

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statute, the money is paid into the State treasury in the same manner as all other taxes.

With these provisions in force, on the 1st day of November, 1875, the present Constitution took effect.

S. B. Galey and R. G. Knight, for the motion.

GANTT, J. The only question raised by this motion is whether section 26, chapter XXII, General Statutes of 1873, requiring a tax to be paid on the commencement of any suit in the Supreme Court, is inconsistent with the new Constitution.

The act provides that "upon the commencement of any suit in the Supreme Court, the party so entering the same shall pay to the clerk of that court the sum of ten dollars." The act further provides that if the person desiring to commence a suit shall file with the clerk an affidavit, that he is unable, on account of poverty, to pay the fee, the clerk shall enter the fact on his journal, and the suit upon the docket, and the fee shall be taxed and collected as other costs. The clerk shall pay the fees so collected to the treasurer of the county in which the court is held; and the county treasurer shall pay the amount of such fees so received by him to the State treasurer.

Section 1, Article XIV, of the Constitution declares "that no inconvenience may arise from the revisions and changes made in the Constitution of this State, and to carry the same into effect, it is hereby ordained and declared that all laws in force at the time of the adoption of this Constitution, not inconsistent therewith, * * * shall continue to be as valid as if this Constitution had not been adopted."

But Section 1, Article IX, entitled "Revenue and Finance," provides that "the legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property, the value to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates."

It is therefore contended on the part of the relator, that by this section the taxing power of the legislature is limited to the objects and classes of business enumerated, and that as the tax required to be paid on the commencement of suits is not included in any one of the classes

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thus enumerated, the act imposing such tax is inconsistent with the Constitution and void.

The Constitution vests the legislative authority in a Senate and House of Representatives, with certain restrictions and limitations imposed on that body, plainly expressed in the instrument itself; but independent of these limitations, it is said that the legislative power is supreme within its proper sphere. Hence the Constitution of the State, according to the rule which seems to be well settled, is not regarded as a grant but rather as a restriction of legislative power, and so "in an inquiry as to whether a statute is constitutional, it is for those who question its validity to show that it is prohibited." Cooley, in his work on Constitutional Limitations, 479, says that "the power to tax rests upon necessity, and is inherent in every sovereignty;" and Chief Justice MARSHALL, in the case of *The Providence Bank v. Billings*, 4 Peters, 563, says that "the power of legislation, and consequently of taxation, operates on the persons and property belonging to the body politic. This is an original principle which has its foundation in society itself. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally." The rule is well settled that the taxing power vested in the legislature is without limit, except such as may be prescribed by the Constitution itself.

But does the section of the revenue article, now under consideration, limit or restrict this power of taxation exclusively to the objects and classes therein enumerated?

The theory of construction, advanced on the part of the relator, assumes that this power is limited by implication, upon the principle, *expressio unius est exclusio alterius*; but does this rule apply to the taxing power of the legislature? I think not. And as no positive restriction is imposed on the exercise of this power in respect to other matters, not included in the objects and classes enumerated, I think the rule is, that the framers of the Constitution relied for protection in this regard upon the wisdom and justice of the representative body and the accountability of its members to the people, rather than the restraining power of the courts of law. It is said that "the courts can enforce only those limitations which the Constitution imposes, and not those implied restrictions, which, resting on theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives." Cooley's Const. Lim. 129; *State v. McCann*, 21 Ohio St. 210.

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In construing constitutions with a provision that the tax shall be "equal and uniform," it has been held that these words apply only to a direct tax on property, in order to prevent an arbitrary taxation without regard to value in respect to the kind or quality of property; and that such clause is no limitation on the power of the legislature as to other objects of taxation. Hence, under such clause, specific taxes have been sustained as a valid exercise of legislative power. *Sawyer v. City of Alton*, 3 Scam. 127; *Alanier v. Governor*, 1 Tex. 653; *Franklin v. National Insurance Co.*, 43 Mo. 491.

And in *Sawyer v. City of Alton* it is further held, "that it is competent for the legislature to exercise all powers not forbidden in the Constitution of the State, and delegated to the general government, nor prohibited to the State by the Constitution of the United States."

In *Pullen v. The Commissioners*, 66 N. C. 364, the facts showed that P. S. died, leaving a will, by which she bequeathed a large amount of personal property to strangers, and made the plaintiff her executor. The property was taxed uniformly with other property, and was also subject to a tax as a legacy — not regarded as a tax on property, but rather as a tax imposed on the succession, on the right of the legatee to take under the will. The court said "it was argued, that because the Constitution (Art. V, § 3) says that 'the general assembly may also tax trades, professions, franchises, and incomes,' and as the right of succession cannot be technically classed under either of these heads, it must be implied that the legislature was forbidden to tax such a right on the rule of interpretation that the expression of a thing implies the exclusion of another." *Held*, that this implication is too slight and does not apply in such case, and that "it is not by such artificial rules that constitutions are to be construed."

Upon both principle and authority we are of opinion that the motion must be overruled.

All of the judges concurred.

Motion overruled.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

WILBUR v. LYNDE.

(49 Cal. 290.)

Corporation — illegal contract — note to trustees.

A promissory note made by a corporation to its trustees is against public policy and void.

ACTION against stockholders in a corporation to recover their proportion of an alleged indebtedness of the corporation upon two promissory notes. The facts were as follows :

The " People's Steam Navigation Company " was established in 1858, with a capital stock of one hundred thousand dollars, divided into shares of two hundred and fifty dollars each. In May, 1868, the defendants became the owners of eight shares of the capital stock of the corporation. In September, 1869, the corporation made its promissory note for \$3,000, by which it promised to pay to the order of the plaintiffs, said sum. The note was signed " A. H. Wilbur, President People's Steam Navigation Co. J. W. Goad, Secretary, P. S. N. Co." The note was delivered to the plaintiffs.

On the 25th of September, 1869, another note of like tenor and effect for \$700, was made and delivered. The corporation having failed to pay the notes, this action was brought to recover from the defendants such proportion of the debt as their stock bore to the whole amount of stock taken. This proportion was \$370.24. The court below rendered judgment for the plaintiffs, and the defendants appealed.

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The other facts are stated in the opinion.

A. L. Hart, for appellants.

W. F. Goad and *J. T. Harrington*, for respondents.

RHODES, J. It is alleged in the complaint that the People's Steam Navigation Company executed to the plaintiffs two promissory notes ; that they remain due and unpaid ; that the defendants became stockholders of said corporation — or "members of the said corporation," as the complaint states — and that the defendants are liable to pay the plaintiffs a specified sum of money as their proportion of the indebtedness of the corporation. The defendants' demurrer having been overruled, they answered, setting up the fact that at the time when the notes were made the plaintiffs were "the duly elected, qualified and acting trustees of said People's Steam Navigation Company." The cause was submitted upon the pleadings, and judgment was rendered for the plaintiffs.

The case comes fully within the doctrine of *San Diego v. San Diego and Los Angeles Railroad Company*, 44 Cal. 112, that the law will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity ; and that express contracts thus made are contrary to public policy and void. The rule is not only sustainable on principle, but is supported by abundant authority.

Judgment reversed and cause remanded.

McKINSTRY, J., concurring. I concur in the judgment. The plaintiffs could not, by executing promissory notes as trustees of the corporation, to themselves as individuals, create evidence which would *prima facie* establish an indebtedness against the corporation, and against each stockholder.

Mr. Justice NILES did not express an opinion.

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PRESTON V. HILL.

(50 Cal. 43.)

Attorney and client — power of attorney to compromise an action.

An attorney at law has no power, merely by his retainer as such, to compromise an action and consent to the entry of judgment in accordance with a stipulation, if his client, with the knowledge of the adverse attorney, objects to it, and such objection is brought home to the attention of the court before the judgment is entered.

SUIT in equity to obtain a new trial in a foreclosure suit wherein the plaintiffs in this suit were defendants, and in which a decree was ordered on the stipulation of the attorneys.

The court below refused to grant a new trial and the plaintiffs appealed.

The other facts are stated in the opinion.

S. F. & L. Reynolds, for appellant.

F. D. Colton and *E. S. Lippit*, for respondent.

CROCKETT, J. This cause was here on a former appeal, which was decided at the October term, 1869. On that appeal it appeared that at the trial the plaintiffs offered evidence tending to support the defenses set up in their answer in the foreclosure suit; but the court below excluded the evidence, and this ruling was the principal error relied upon. We reversed the judgment upon this ground; and this was the only point decided on that appeal. On the return of the cause to the District Court, it was tried anew and a judgment entered for the defendants, from which the plaintiffs appeal on the judgment-roll.

The point chiefly discussed by counsel is whether, upon the facts set forth in the findings, the counsel decree entered in the foreclosure suit, upon the stipulation signed by Mr. Patterson, the attorney of record for these plaintiffs (who were defendants in that action), is obligatory upon them, assuming that there was no fraud or collusion in the transaction.

The facts in respect to the stipulation and the entry of the decree are set forth in the following findings:

“That upon the said trial, which was in the forenoon of that day, the plaintiffs in the said foreclosure suit examined on their part four witnesses. When and thereupon, and at about one o'clock of that day, a short recess was directed by the then judge of the court. That soon after the recess was directed, a compromise was suggested by some persons who were not parties to the suit.

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“ That at once, without the knowledge or consent of the said defendants in said foreclosure suit, plaintiffs in this suit, William H. Patterson, one of the attorneys of the said defendants in said foreclosure suit, and who had, as counsel, the management of the defense therein, commenced and entered into negotiations with the plaintiffs in said foreclosure suit, defendants in this suit, for a compromise of the said foreclosure suit.

“ That the said Patterson made and received propositions for a compromise without any directions, consent or knowledge of the said defendants in said foreclosure suit, and without consulting them, or either of them, about such propositions, and when the propositions were made known to the said Robert J. Preston, by the said Patterson, he, the said Robert J. Preston, peremptorily refused to agree to or entertain such propositions, and demanded that the trial of the cause should proceed, as the said defendants had a good defense to the said action.

“ That at no time during that day, or at any other time, did any of the defendants in said foreclosure suit, plaintiffs in this suit, direct or authorize the said Patterson to make any compromise, or to make or sign the stipulation hereinafter set forth, or compromise the said action by the stipulation, or by any stipulation, or otherwise ; but on the contrary, refused to listen or consent to any compromise whatever, and peremptorily insisted that the trial should proceed.

“ That George Pearce, Esq., an attorney of this court, was associated as counsel with said Patterson in the defense of the said foreclosure suit, and objected to the settlement or compromise as made, and informed the said Patterson at the time that the said Preston would never consent to the settlement and compromise.

“ That A. W. Thompson was attorney for the plaintiffs in the foreclosure suit, and J. McM. Shafter, Esq., was associated with the said Thompson as counsel for the plaintiffs in the said foreclosure suit.

“ That late in the afternoon of that day a stipulation was made and signed by the said Patterson and the said Thompson.

“ That the said stipulation was filed in this court on the same day, and thereupon, on the same day, a decree was entered, which said stipulation and decree are set forth in full in the complaint in this action.

“ That the said defendants in the said foreclosure suit, plaintiffs in this suit, or either of them, had no knowledge or information of the said stipulation before it was filed as aforesaid, nor did the said Patterson inform them, or either of them, of the said stipulation, or of its contents.

“ That the attorney and counsel of the plaintiffs in the said foreclosure suit had notice and knowledge of the facts of the want of authority on the part of Patterson, and consent on the part of the defendants in the

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said foreclosure suit, to make the said stipulation, or to compromise the said action, and to put the said plaintiffs in the said foreclosure suit, upon inquiry as to the want of power or authority of Patterson to make and sign such a stipulation, and the want of consent of the said Prestons thereto.

“That when the said Pearce told the said Patterson that the said defendants in the said foreclosure suit would not consent to the said stipulation, the said Patterson avowed to the said Pearce that he would assume the power, and compel them to abide by and submit to the said compromise.

“I further find that on that day, in the evening, the court convened again, and the judge called the cause, when the said Thompson stated to the court that the said cause was settled, when the said Pearce, who was then present in court, stated to the judge, in the presence and hearing of said Thompson, that the said cause was not settled, and that the said defendants in the said foreclosure suit had refused and were opposed to any compromise of the said action of foreclosure. But, notwithstanding the statement of the said Pearce, the said stipulation was thereupon filed, and decrees ordered, which decree was made, signed and entered that evening.”

On these facts we are called upon to decide whether the decree entered in the foreclosure suit is obligatory on the plaintiffs.

The extent to which an attorney may bind his client has been several times considered by this court, and repeatedly by other courts, both English and American. It is held by all courts, without exception, so far as I am aware, that in the absence of fraud, the acts of an attorney in the ordinary conduct of a cause will bind his client. In this State the statute provides that he may bind his client “in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise.” But in England and in this country the question has frequently arisen, to what extent, if at all, and under what circumstances, if any, an attorney can bind his client by a compromise of a pending action, without the express authority of the client. In England the decisions are not uniform, and the question does not appear to have been definitely settled, though it has been much discussed in several recent cases, which tend strongly to support the rule which prevails in most of the American courts, denying the authority of an attorney to compromise a pending action, merely by virtue of his retainer, and without the consent of his client. In *Swinfen v. Swinfen* 24 Beaven, 549, decided in 1857, Sir SAMUEL ROMILLY, Master of the Rolls, after an elaborate examination of the authorities, concurs in this

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view of the question. On appeal, however, the case was decided on other grounds (2 De Gex & Jones, 381). But in a subsequent action brought by the same plaintiff against the attorney, Chief Baron POLLOCK, in delivering the opinion of the court, held "that although counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, withdrawing a juror, calling no witnesses, * * * and other matters which properly belong to the suit and the management and conduct of the trial, he has not, by virtue of his retainer in the suit, any power over matters which are collateral to it." *Swinfen v. Lord Chalmeford*, 2 L. T. R. (N. S.) 406.

In the United States, the rule, as settled by an almost uniform current of authorities, is that an attorney, by virtue merely of his retainer as such, and without express authority from his client, has not the power to bind the client by the compromise of a pending action. In *Holker v. Parker*, 7 Cranch, 436, the facts were, that in an action on a money demand, the attorneys for the respective parties agreed that the matters in issue might be referred by the court to referees to make a report as to the accounts between the parties. The reference having been ordered, the attorneys agreed that the referees should award \$5,000 to the plaintiff in full of all demands. The award was made in accordance with this agreement, and judgment on the award was entered for the plaintiff. The judgment was satisfied by payment to the plaintiff's attorney; but on being informed of these facts, the plaintiff repudiated the transaction on the ground that his attorney had exceeded his authority, and commenced an action to set aside the award and judgment, and for an accounting. At the trial there was no proof of fraud or collusion on the part of the attorney; but it appeared that a much larger sum was due to the plaintiff than was awarded by the referees. The Supreme Court set aside the judgment and ordered an accounting, on the ground that the agreement between the attorneys, as to the amount to be awarded by the referees, was in effect a compromise, and not simply an award; and that the plaintiff was not bound by the compromise, and the judgment in pursuance of it, on the ground that the plaintiff's attorney had exceeded his authority. The opinion of the court was delivered by Chief Justice MARSHALL; and the legal proposition decided was identical with that involved here, with this exception, that in this case it appears the client protested against the compromise before it was made, and against the entry of the judgment, in the presence of the court and of the opposing counsel, while in that case it only appeared that the client was ignorant of the compromise until after the entry of the judgment, and had not assented to it. In the present case, there was not only a want of author

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ity in the attorney to make the compromise, but an active opposition to it by the client, of which the court and the opposing counsel were advised before the entry of judgment. In *Smith's Heirs v. Dixon*, 3 Met. (Ky.) 438, decided in 1861, the facts were that the plaintiff employed an attorney to prosecute an action in equity for the recovery of a valuable tract of land claimed by the defendants and in their possession. While the action was pending the plaintiff's attorney entered into a compromise, whereby, in consideration of a sum of money paid by the defendants, it was agreed that a decree be entered in favor of the defendants, quieting their title as against the plaintiff, and dismissing the complaint. The decree was accordingly entered, reciting on its face that it was entered by consent. On being informed of the facts, the plaintiff brought an action to set aside the decree, on the ground that the attorney exceeded his authority in entering into the compromise; and this view was sustained by the Court of Appeals. PETERS, J., in delivering the opinion of the court, after reviewing the authorities, says: "The general question of the authority of an attorney has often been discussed in courts of justice, but it has not been held in any of them that an attorney, who is clothed with no other authority than what is incident to his retainer, can compromise and discharge his client's claim." After citing several authorities in support of the proposition, he proceeds to say: "We have been referred to no case which militates against the ruling in the foregoing cases, while many others might be cited which fully sustain them." After deciding that the decree must be set aside, he says: "A different conclusion cannot be reached (as we have seen) without infringing upon the well-settled rules of law, and sanctioning a dangerous power — too dangerous to be allowed by implication." To the same effect are *Hudson v. Mitchell*, 14 Serg. & R. 307; *Stackhouse v. O'Hara*, 14 Penn. St. 88; *Stukely v. Robinson*, 34 id. 316; *Abbe v. Rood*, 6 McLean, 106; *Derwent v. Loomer*, 21 Conn. 245; *Davidson v. Rozler*, 23 Mo. 387; *Fitch v. Scott*, 3 How. (Miss.) 317; to which might be added many other cases.

It is claimed, however, that a different rule has been established in this State by the statute and by the adjudications of this court. As I construe the statute, it is only declaratory of the common-law rule, except in so far as it provides that the "agreement" by which an attorney may bind his client, in any step in the action, "shall be filed with the clerk or entered upon the minutes of the court." It was not intended to enlarge or abridge the authority of the attorney: but only to prescribe the manner of its exercise, by requiring the agreement to be filed with the clerk or entered upon the minutes. The only adju-

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cation by this court to which our attention has been called, having any material bearing upon the point under discussion, was in *Holmes v. Rogers*, 13 Cal. 191. That was an action to set aside a decree entered by the consent of the plaintiff's attorney, in pursuance of a compromise agreed upon by the attorney without the knowledge or consent of his client.

This court upheld the decree, on the ground that in the absence of fraud or mistake, a party to an action is bound by a judgment entered by the consent of his attorney, under the circumstances stated, and particularly if the attorney be not insolvent. For the purposes of this decision it is unnecessary to review the opinion and judgment of the court in that case. It will be time enough to do so when a similar case shall come before us. But in the present case, the facts are quite different. In that case, all that appeared was, that the attorney, without the knowledge or consent of his client, compromised the cause of action, and consented to the entry of a decree in accordance with the terms of the compromise. In this case the attorney entered into the compromise in defiance of the protest of his client; and in open court, in the presence of the adverse attorney, the client remonstrated against it as having been made without authority, and insisted that the trial should proceed. The question for decision, therefore, is, whether by virtue merely of his retainer, an attorney may compel his client to submit to a compromise against his protest made at the time, and renewed in open court, in presence of his adversary, before the entry of the judgment. No case has been produced, nor do I think one can be found, in which any court has decided that such a proceeding can be upheld either on reason or authority. Whatever presumptions the court or the adverse party might ordinarily be authorized to make, as to the authority of an attorney who proposes to compromise his client's cause of action, all such presumptions must cease, when the client, before the transaction is consummated, notifies the court and his adversary, in the most formal manner, that his attorney has acted without authority, and that he repudiates the bargain. The attorney is but the agent of the client for the management and conduct of the cause; but his retainer does not give him an unlimited power to dispose of his client's estate, by way of compromise, against which the latter protests in the presence of his adversary, before the transaction is consummated. If the mere retainer of an attorney confers upon him so dangerous a power over the estate of his client — a power against the exercise of which the protest of the client, made at the time in the presence of his adversary, is wholly unavailing — it is time that so serious a grievance should be corrected by legislation. It is clear, however, that the power does not exist.

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But it is suggested that the administration of justice would be seriously embarrassed if it was incumbent on the court, and on the adverse party at his peril, before entering a consent decree founded on a compromise, to engage in an inquiry whether the attorney who consented to it had the requisite authority. The suggestion is satisfactorily answered by Sir SAMUEL ROMILLY, Master of the Rolls, in *Swinfen v. Swinfen, supra*. In that case it was strongly pressed upon the court by the Attorney-General, that the client would be bound by a compromise entered into by his attorney, whether the client had consented or refused; and that if it were otherwise, the administration of justice would be greatly impeded. In reply to this suggestion the Master of the Rolls says: "But if the doctrine which the Attorney-General expressed so strongly were to prevail, viz., that a client would be bound, whether he had consented or refused, it would be the incumbent duty of the court, in every case, to ascertain that the facts had really been brought before the attention and had received the consent of the client before the order was made. The court gives credit to counsel, and with good justice, for it knows that they act according to their instructions. It gives credit to the instructions given by the solicitors, knowing perfectly well that solicitors act with the most perfect *bona fides*, and never give instructions which they do not consider they are duly authorized to give. Accordingly, it is for this reason that this court never inquires whether the client has given his consent or authorized the solicitor to give it; the court assumes, upon the statement of counsel, that the solicitor has so instructed him, and that the solicitor has obtained the consent of the client to the arrangement. If that were not so; if the solicitor, without the authority of his client, could give a consent, depriving a party of a certain portion of his property, how could this court act, with any confidence, without seeing that the solicitor had duly exercised his discretion in the case with regard to adults, as it does with regard to infants?"

"In the case of infants the judge inquires, because he knows they cannot give their consent; but he does not do so in the case of persons who are competent to consent, because he assumes that they have been made acquainted with the facts, and that they have authorized the thing to be done. If the case were otherwise, what would be the consequence of the doctrine suggested by the Attorney-General? It would be this: That every prudent man who employed a solicitor to conduct a case for him would give this notice to the opposite side: 'You are to understand that my employment of a solicitor does not authorize him to compromise the suit without my express sanction and authority.' But after

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that would the compromise be good? for a great portion of the argument has gone to this extent: that the attorney has a species of authority of which the client could not deprive him, and that he would be bound by acts done under that authority, although done against his desire, and although that desire had been communicated to the other side.

"I myself have no doubt whatever, both on principle and authority, that the employment of an attorney does not entitle him to sell the subject-matter of the suit either to a stranger or to the opposing party, without an authority for that purpose; and that so far from its being productive of injurious consequences that he should not possess that authority, I think that the consequences would be to the highest degree injurious if he had it, and that it would seriously impede the administration of justice. For myself I should in that case be indisposed to allow any case of importance to be taken before me by consent, without being satisfied by evidence that the client himself had been communicated with on the subject.

"Since I have been upon the bench, I have always assumed that the client has been communicated with, and that what is proposed is done with his sanction and knowledge. My opinion is, that unless this were so, the functions of this court in matters of consent would be paralyzed. It would be too great an abuse of authority for an attorney to say that he has a right to dispose of the property of his client in a particular way, when if he had communicated to him all the facts the result would have been different; and yet that the other side are at liberty to say that they are entitled to insist on such an agreement, and that the party is bound by it."

Mr. Patterson having exceeded his authority in entering into the compromise, which fact was known to the adverse attorney at the time, and was brought to the attention of the court before the decree was entered. I am of opinion that the plaintiffs are not bound by it, and that it should be set aside.

Judgment reversed and cause remanded, with an order to the court below to enter a judgment vacating and setting aside the consent decree in the foreclosure suit.

Remittitur forthwith.

Mr. Chief Justice WALLACE, being disqualified, took no part in the decision.

Christy v. Sullivan.

CHRISTY v. SULLIVAN, appellant.

(50 Cal. 337.)

Sale — of invalid obligations — purchaser presumed to know the law.

Plaintiff purchased from defendants county warrants drawn by the auditor upon the treasurer, but which were upon their face invalid, and not a charge upon the county. *Held*, that plaintiff was presumed to know the law, and in the absence of fraud or misrepresentations, could not recover the price paid defendant. (*See note, p. 656.*)

ACTION to recover of defendant money paid by plaintiff for county warrants. These warrants were issued by the auditor of Sacramento county, to Sullivan, as assignee of one Anderson, an ex-auditor of the county, and were for the sum of \$33.00, allowed said Anderson by the board of supervisors of said county, for extending the figures on the general tax roll for two years.

The board had no authority in law to make an allowance to the auditor for the services designated, beyond the sum of \$500 for any one year. Sullivan, the defendant, sold the warrants to the plaintiff soon after they were issued, for \$2,772. The plaintiff had judgment, and the defendant appealed.

The other facts are stated in the opinion.

George Cadwalader, for appellant.

Beatty & Denson, for respondent.

By the COURT. There does not appear to have been any fraud or misrepresentation by the defendant in the sale of the warrants to the plaintiff, nor were they forged or simulated. On the contrary they were drawn by the county auditor on the county treasurer, in the usual form. It appeared, however, on their face, that, as the law then stood, they did not constitute a valid charge on the county treasury. The plaintiff is chargeable with notice of all the facts which were patent on the face of the warrants, and must be presumed to have known that they did not constitute a charge upon the treasury, as the law then was. The maxim, *ignorantia legis non excusat*, applies to such a case. *Kenyon v. Welty*, 20 Cal. 640. Having purchased with a knowledge of the facts, and being presumed to know the law applicable to the facts, the plaintiff got precisely what he purchased; and if his speculation has proved unprofitable, he must be content with the result. The following authorities, we

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think, are conclusive against the plaintiff: Benjamin on Sales, 309; *Lamert v. Heath*, 15 M. & W. 487; *Lawes v. Purser*, 6 E. & B. 930.

Judgment and order reversed, and cause remanded for new trial.

NOTE.—See *Otis v. Cullum*, 92 U. S. S. C. 447. In that case a bank sold plaintiff municipal bonds which were afterward adjudged void on the ground that the legislature had no power to pass the act under which they were issued. The plaintiff thereupon brought suit against the bank to recover the amount paid for the bonds. The court held that in the absence of express warranty the bank was not liable, and that the vendor of such securities is liable *ex delicto* for bad faith, and *ex contractu* there is an implied warranty on his part that they belong to him and are not forgeries, but not beyond this unless there is express stipulation.—REP.

PRYOR V. DOWNEY.

(50 Cal. 888.)

Constitutional law — remedial statutes — statutes attempting to validate void judgments.

A statute attempting to validate a judgment void for want of jurisdiction and sales made under it, *held* void (1) as an attempt by the legislature to exercise judicial power, and (2) as in contravention of the constitutional provision that "no person can be deprived of his property without due process of law."

EJECTMENT to recover an undivided one-half of a tract of land. Nathaniel Pryor, a resident of Los Angeles, died on the 10th day of May, 1850, seized in fee of the demanded premises, along with other lands in Los Angeles, and also leaving personal property. He left, surviving him, a wife, Paula Romero, and two sons, Paul and the plaintiff Nathaniel. The plaintiff was born in September, 1848. By the will, the testator devised to the plaintiff an undivided one-half of the demanded premises, and to his wife the other half. The will was admitted to probate on the 2d day of July, 1850. The executors nominated in the will refused to qualify, and on the 16th day of January, 1851, Thomas Forster filed a petition for letters of administration.

On February 3, 1851, the court made and entered in its minutes the following order, viz.: "In the matter of the estate of Nathaniel M. Pryor, proof being made to the court that notice has been given according to law of the application for letters of administration now pending, and no person appearing to contest said application, it is ordered by the court that Thomas Forster be appointed administrator with the will annexed, of the estate of Nathaniel M. Pryor, and that he give security according to law, and that until the filing of bond, the said Thomas Forster is appointed special administrator of said estate."

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There was found among the papers of the estate, a bond signed by Thomas Forster and John Forster, but it had not been filed or approved by the Probate Court, nor was there any entry in the minutes of the Probate Court in reference to it. Shortly after the date of the bond Forster assumed to act as administrator, and filed petitions and made reports to the court in that capacity, and was treated as such by the court. Said Forster did not, however, take the oath of office, nor were letters of administration issued to him. On the 14th day of January, 1853, Forster filed a petition asking for an order to sell real estate, part of which constituted the demanded premises.

It did not appear from the minutes or records of the court, or from any papers on file, or otherwise, that any proceedings were had by the court in reference to the said petition or the sale prayed for, at the March term of said year, or at any term until the July term.

The court decreed that the administrator proceed to sell the real estate, and the sale was made.

On the 21st day of September, 1853, the next day after the report of sale had been filed, the court made an order confirming the sale, and on the day following, Forster executed and delivered to the purchaser a deed in the usual form. Forster was finally discharged from the administration, and the administration closed on the 30th day of January, 1854. The defendants claimed the demanded premises under the purchase at the administrator's sale. They were severally in possession of parcels of the same, and answered separately, setting up the statute of April 2, 1866. The plaintiff had judgment in the court below, and the defendants appealed.

The other facts are stated in the opinion.

James H. Landers, for appellants.

Glassell, Chapman & Smith, for respondent.

McKINSTRY, J. The act of April 2, 1866, reads as follows: "In all cases where real estate has been sold in this State, under the order of the Probate Courts of the several counties, to purchasers in good faith, and for a valuable consideration, and defects of form, or omissions, or errors exist in any of the proceedings, such sales are hereby ratified, confirmed and made valid, and *sufficient in law* to transfer the title of the property sold; provided, however, that this act shall not affect, in any manner, rights acquired prior to its passage by vendees, grantees or mortgagees, who claim interests in or liens upon such property under

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heirs or devisees adversely to such probate sales, nor to sanction in any manner cases of actual fraud." Statutes of 1865-6, p. 824.

At the former hearing, this court expressed the opinion that the words "defects of form, omissions or errors," did not embrace a want of power in the person assuming to act as administrator, or the absence of *jurisdiction* in the court which ordered the sale.

Inasmuch, however, as the members of the court were not unanimous in the construction then given, and in deference to the urgent appeal of counsel, we have given to the principal question suggested the investigation its importance demanded. As the result of such investigation, we are compelled to announce (assuming the act to have been intended to render valid and sufficient in law the formal judgments of the Probate Courts, in themselves null), that the statute is without effect, in so far as it attempts to validate such *void* judgments.

A long series of decisions in this State, uniformly holding to the same rule, has determined that the application of an executor or administrator for the sale of lands belonging to the estate is a special and independent proceeding; that the jurisdiction of the Probate Court depends absolutely on the sufficiency of the petition; in other words, on its substantial compliance with the requirements of the Probate Act. Though the proceeding for this sale occurs in the general course of administration, it is a distinct proceeding in the nature of an action in which the petition is the commencement and the order of sale is the judgment. The necessity for a sale is not a matter for the executor or administrator to determine, but is a conclusion which the court must draw from the facts stated, and the petition must furnish the materials for its judgment. *Gregory v. McPherson*, 13 Cal. 562; *Townsend v. Gordon*, 19 id. 188; *Gregory v. Taber*, id. 397; *Sprigg's Estate*, 20 Cal. 121; *Haynes v. Meeks*, id. 288. And the jurisdiction of the Probate Court to order the sale depends on the averments in the petition, and not on the truth of those averments. *Fitch v. Miller*, 20 Cal. 352; *Haynes v. Meeks*, *supra*.

It is unnecessary to point out the defects in the petition found in the transcript. It is beyond all question that it was insufficient to authorize the court to order this sale. It is certain, therefore, that the judgment, in form, ordering the sale, is utterly *void*, unless the act of April 2, 1866, has given it vitality.

Even if we were convinced that the decisions to which we have referred were erroneous, and felt ourselves at liberty, at this day, to hold that the proceeding which led up to the order of sale was merely ancillary to the general administration, and any defects in the petition were

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but irregularities not affecting the jurisdiction of the court to order the sale, as part of the general proceedings for the settlement and distribution of the estate, there is yet another fact in this record which shows the action of the Probate Court to have been absolutely *void*. It was found by the District Court that Forster was never appointed administrator, but that a conditional order only was made to the effect that he should become administrator, on giving security by filing the bond required by law; and it is further found that he never filed such bond, or otherwise qualified as such administrator. The order for the appointment, the qualification of the appointee, and the issuing of letters to him, were all necessary proceedings to invest such appointee with the office of administrator. *Estate of Hamilton*, 34 Cal. 464. The letters of administration may indeed, when issued, be evidence of the regularity of the previous proceedings, but here no letters were ever issued, and it affirmatively appears that no bond was ever filed, nor oath taken. Forster, therefore, was not administrator of the estate, and both the pretended sale by him and the order purporting to authorize it made by the Probate Court — then a court of inferior and limited jurisdiction — were inoperative to transfer to the purchaser any right or estate in the land, legal or equitable. Nor can any recognition by the Probate Court make one an administrator *de facto*. No person can fill that position, except after due appointment and qualification. Under our system, there is probably no such thing as an executor *de son tort*; at all events, no man can be executor *de son tort* in regard to land. And generally, it may be said, an executor *de son tort* is an executor only for the purpose of being sued, or made liable for the assets with which he has intermeddled. Bouv. Law Dic. It necessarily follows, that an attempted sale of land of an estate by one not executor or administrator can transfer no right, even though there should be a subsequent order of the Probate Court as upon a final accounting by the pretended administrator.

The forty-sixth section of the act of April 20, 1863, “concerning the courts of justice and judicial officers” (Stats. 1863, p. 336), did not render the order directing the sale presumptively regular, and within the jurisdiction of the Probate Court. It is not necessary to inquire whether that act is, in other respects, applicable to the facts of the present case; it is enough to say that it clearly refers only to the Probate Courts to be organized under the constitutional amendments of 1862, and not to the Probate Courts previously existing. That act repealed the statute of 1853, and those amendatory thereof, which had provided for the organization of the courts, and the duties of judicial officers; such repeal to take effect only when the organization of the courts under the constitu-

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tional amendments should be perfected ; and it also fully defined the jurisdiction and duties of the courts and judicial officers under the amendments. That the rule declared in the forty-sixth section of the act was not intended to apply to *the old* Probate Courts is demonstrable from the circumstance that it was to take effect only after those courts had gone out of existence, and when the new courts had supplanted them. The *old* Probate Court — a court of inferior and limited jurisdiction — *ceased* at the same moment of time that the *new* Probate Court — whose “records, orders, judgments and decrees” were to have accorded to them the like force and effect, and legal presumptions, as those of the District Court — began to exist.

The question which remains to be considered is this : Has the legislature power to make a pretended and void judgment, entered by a court without jurisdiction, valid and effective for any and all purposes ?

Very able jurists have intimated that the courts of some of the States have gone further than correct principles would warrant to sustain retroactive laws ; a species of legislation always cautiously to be admitted, because obnoxious to most serious objections. Nowhere, perhaps, had the courts gone farther in that direction than in Pennsylvania. The indignant language of Chief Justice GIBSON, in *Greenough v. Greenough*, indicates his opinion that such decisions had brought the law of that State to an unenviable condition. “In a moral or political aspect,” says he, “an invasion of the right of property is as unjust as an invasion of the right of personal security. But retroactive legislation began and has been continued, because the judiciary has thought itself too weak to withstand ; too weak, because it has neither the patronage nor the *prestige* necessary to sustain it against the antagonism of the legislature and the bar. Yet, had it taken its stand on the rampart of the Constitution in the outset, there is some little reason to think that it might have held its ground. Instead of that it pursued a temporizing course, till the mischief had become intolerable, and till it was compelled, in *Norman v. Heist*, and *Bolton v. Johns*, to invalidate certain acts of legislation, or rather to reverse certain legislative decrees.” 11 Penn. St. 495. And the Supreme Court held that in Pennsylvania the legislature could not exercise judicial power, nor take away property without due process of law.

The repugnance of Chancellor KENT to this species of legislation appears from his very able opinion in *Dash v. Von Kleeck* 7 Johns. 477. In his Commentaries, after saying, “A retrospective statute, affecting and changing vested rights, is very generally considered in this country as founded on unconstitutional principles, and consequently

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inoperative and void" (vol. 1, p. 456), he adds, that this does not apply to a remedial statute which may be of a retrospective nature; and he then proceeds to define such statutes with so many conditions and restrictions as show how much he was impressed with the danger of an abuse of the power, unless restrained by constant reference to its many limitations under our American Constitutions. Among these conditions he declares "that it has been held" the courts may regard the circumstance that a law "is clearly just and reasonable," but he is careful not to commit himself to the statement that such matters may be at all considered when the sole question is one of legislative power. The reference seems to be to *Goshen v. Stonington*, 4 Conn. 209, a judgment which may be sustained on other grounds, but where the court seems to have relied on the aphorism of Bacon, that retroactive laws ought not to be passed, *nisi ubi leges cum justitia retrospicere possint*. But the Connecticut case was not decided on the broad ground that such laws may be enacted in an American State whenever they appear to be just and reasonable, nor could it have been without a clear violation of fundamental principles. In both instances referred to in the "Commentaries," and which are ordinarily referred to as illustrations of the power to pass retroactive laws, being statutes to confirm former marriages defectively celebrated, and to confirm sales of land defectively acknowledged, the contracts were such as would have been valid at the common law, and the effect of the subsequent statute was simply to remove an obstacle created by a former statute. The author remarks: "The legal rights affected in those cases by the statute were deemed to have been vested subject to the equity existing against them, and which the statute recognized and enforced." And statutes to cure defective acknowledgments seem originally to have been sustained on the theory that the vendor, upon established principles of equitable cognizance, had parted with the title to the land. Thus, in *Chestnut v. Shane's Lessee*, 16 Ohio, 599, the Supreme Court of Ohio expressly say of such a curative act: "It operates only on that class of deeds when enough has been done to show that a Court of Chancery ought in each case to render a decree for a conveyance, assuming that the certificate was not such as the law required. And when the title was such that equity ought to interfere and decree a good legal title, it was within the power of the legislature to confirm the deed, without subjecting an indefinite number to the useless expense of unnecessary litigation."

Nowhere does Chancellor KENT intimate an opinion that the legislature can validate a pretended judgment of a court, rendered without the acquisition of jurisdiction, or that it can annul a valid judgment.

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He closes his remarks on the subject with the warning: "The cases cannot be extended beyond the circumstances on which they repose, without putting in jeopardy the energy and safety of the general principles." Nor can the power to validate a *void* decree be employed indirectly, by declaring how a judicial question — arising on the law as it stood prior to the declaratory statute — ought to have been decided. As suggested in a note (1 Kent's Com. 456): "It seems to be settled as the sense of the courts of justice in this country, that the legislature cannot pass any declaratory act, or act declaratory of what the law was before its passage, so as to give it any binding weight with the courts." And this position is supported by an abundance of authority.

The legislature of California cannot exercise any judicial function, and no person in this State can be deprived of life, liberty or property without due process of law. Constitution, Art. III; Art. I, § 8.

It would be very difficult, if not impossible, to harmonize the decisions of the courts of the several States of the Union relative to the subject we are considering, although the divergence in the reasoning of the courts is not so great as the judgments would seem to indicate. But it has always been held where a Constitution similar to our own exists, that the legislature can neither exercise judicial power nor deprive a citizen of his property, except by the law of the land; the doubt sometimes being, what is the property, or the vested rights, of which he may not be so deprived. In the present case it cannot be pretended that the purchaser at the Forster sale acquired any equitable estate, which he could make the foundation of an action against the heirs or devisees, and that the effect of the statute was to transform an equitable into a legal title. *Chestnut v. Shane's Lessee, supra*. As to any vague, indeterminate and indeterminable "moral equity" — if any such exist — it may well be doubted whether we can recognize such, since the courts have no standard by which to estimate its sufficiency or effectiveness. Even if we could adopt, however, the measure of right suggested by some of the cases, we are not prepared to hold that the plaintiff in this action may not insist upon his complete legal and equitable title, without violating any principle of morality. 9 Gill, 299. Admitting that the estate of the ancestor comes to the heir burdened with the debts of the former, it is still the right of the latter — when courts are organized, or are required by the Constitution to be organized for the settlement of the estates of descendants — to have the debts ascertained and the property applied by a tribunal of competent jurisdiction. And, upon any theory, the doctrine of estoppel — which is claimed to impose an imperfect duty capable of being ripened into a perfect obligation by the

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legislative will — can have no application, unless a party by his own contract, or other voluntary act, has placed himself in such an attitude that it would be a violation of sound morality on his part for him to adhere to and insist on his legal and equitable rights. It ought not to be made to apply to this plaintiff merely because he was a party, as an infant, to a pretended legal proceeding.

It would seem to have been said by the Supreme Court of Indiana, that a void judgment could be rendered valid by a subsequent act of the legislature. *Walpole v. Elliott*, 18 Ind. 259. But, as is pointed out by Judge COOLEY (Const. Lim. 383, note 3), the language employed was broader than the facts called for, since, in that case, there was not a failure of jurisdiction, but an irregular exercise of it. And that learned writer thus lays down the rule as to retrospective statutes in respect to legal proceedings: "In judicial proceedings, if there was originally a failure of jurisdiction, no subsequent law can confer it." Const. Lim. 383. "A retrospective statute curing defects in legal proceedings where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds, unless expressly forbidden." Id. 371.

In *Nelson v. Rountree*, the Supreme Court of Wisconsin treat as "not to be discussed at this day" the proposition that the legislature is competent to declare that to be a judgment which before was no judgment. 23 Wis. 370. And in reference to the statute of 1866, may be repeated what was said by the Supreme Court of Illinois, in respect to a statute not very dissimilar: "If it was competent for the legislature to make a void proceeding valid, then it has been done in this case. Upon this question we cannot for a moment doubt or hesitate. They can no more impart a binding efficacy to a void proceeding than they can take one man's property from him and give it to another. Indeed, to do the one thing is to accomplish the other." *McDaniel v. Correll*, 19 Ill. 228.

As we have seen, the order of the Probate Court directing the sale by Forster, and the sale of the 19th of September, 1853, were *void*. If prior to the enactment of April 2, 1866, the validity of the sale in question has been presented to this court, even in a collateral proceeding, we must have held, both upon reason and authority, that it transferred to the purchaser no estate in the land. Had the District and Supreme Court in fact decided the sale by Forster to be void, and the legislature had then enacted that the judgment should be set aside, and the validity of such sale again be made the subject of judicial inquiry, the interference by the legislature with a distinct department of the government would be palpably apparent to every mind. In every case, and the instances

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are few, in which such a law has been passed upon by the courts of a State having a written Constitution, it has been declared unconstitutional; even when there was in the written Constitution no express provision prohibiting the legislature from exercising judicial power. But had the legislature gone one step further, and, by special enactment or by general law covering the case, commanded the courts which had rendered a judgment in favor of a plaintiff, in an action based on the invalidity of the Forster sale, to set it aside and to enter a judgment for the defendant, such arbitrary attempt would at once have been recognized as an abuse not to be tolerated under our free Constitution of government. The circumstance that the validity of this very order of sale had never been before the courts does not make the statute (assuming that it applies to such order) any the less an effort summarily to dispose of a question purely judicial, or to deprive citizens of their property "without due process of law." This last expression is the equivalent of "the law of the land;" a law which, as said by Mr. Webster in the Dartmouth College case, "hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

If we assume the act to have validated the Forster sale (and order of sale), then the lands which up to the date of the act — April 2, 1866 — belonged to the heirs of Nathaniel M. Pryor, from that date became the property of other persons, and this transfer was accomplished by the legislative act alone. And even if we could indulge the fiction that the parties to be deprived of their estates had notice of the intended act, and a hearing and opportunity to produce witnesses, or to show cause why the act should not be passed, this would have been a species of trial, and the exercise of judicial power by the legislature.

Sections 154 and 155 of the Probate Act of 1851 read as follows: "When the personal estate in the hands of the executor or administrator shall be insufficient to pay the allowance to the family and all the debts and charges of the administration, the executor or administrator may sell the real estate for that purpose upon the order of the county judge. To obtain such order he shall present a petition to the Probate Court, setting forth the personal estate that has come to his hands, and how much thereof, if any, remains undisposed of: the debts outstanding against the deceased, as far as the same can be ascertained; a description of all the real estate of which the testator or intestate died seized; and the condition and value of the respective portions and lots; the names and ages of the devisees, if any, and of the heirs of the deceased; which petition shall be verified by the oath of the party presenting the same."

It cannot be doubted that the effort to ascertain the existence or non-

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existence of the facts which, under the law, can alone authorize a sale of real estate, is a judicial inquiry, and that the finding of facts which must precede the order of sale is a judicial finding. The determination that a sale is necessary for a purpose stated in the petition is an adjudication, and the power thus to adjudicate may be, and has been, appropriately placed in the Probate Court, a judicial tribunal expressly named as such in the sixth article of the Constitution, which treats of the "judicial department."

As appears, however, in the present case, the petition was fatally defective, and the Probate Court had no power to authorize Forster (not an executor or administrator) to make a sale. We can discover no well-founded distinction between a want of jurisdiction as to the persons of parties to a proceeding, and an entire failure of jurisdiction as to the subject-matter, such as appears by this record. In Massachusetts, if, when a widow presents her petition to the Probate Court to have her homestead set off, the heirs dispute her claim, the issue between her and them must be tried in some other court. But, notwithstanding the opposition of the heirs, the Probate Court heard the matter, and after a trial, *in which all parties in interest participated*, entered a decree denying the petition, on the ground that the widow had no homestead. In proceedings before a court of competent jurisdiction, she afterward sought to assert her claim to a homestead. Her claim was opposed on the ground, amongst others, that her right had been terminated by the decree of the Probate Court. But the Supreme Court of Massachusetts held, notwithstanding the Probate Court had fully acquired jurisdiction of the *persons* of all interested, and, but for the opposition of the heirs, would have had power to enter the decree, that the decree was absolutely void. Freeman on Judgments, 264; *Mercier v. Chace*, 9 Allen, 242. Had all interested in Pryor's estate been present when the order of sale was made (as it is claimed they were), the court would have had no power to order a sale by one on whom the power to sell could not be legally conferred; nor to inquire, in the absence of a *petition*, whether a sale was legally necessary for any purpose *which might have been set forth* in a proper petition.

As the proceeding in the Probate Court was void, no adjudication was made prior to the act of April 2, 1866, and, as we have seen, the legislature cannot adjudicate upon the legal rights of parties. Such questions as are judicial in their nature are not to be settled arbitrarily or capriciously, but by the application of fixed rules and established principles. A judgment must be the result "of due inquiry, sufficient to satisfy the discretion and convince the judgment of the officer of the law,

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in whom the authority and jurisdiction to decide the questions involved have been duly vested." *Denny v. Mattoon*, 2 Allen (Mass.), 380. Until such adjudication, no proper foundation is laid for the order of sale, nor in the absence of such adjudication by the court of competent jurisdiction, can the property of heirs or devisees be said to be taken from them by due process of law. If they are to be held to all the consequences which would have followed from a proper and valid adjudication, it must be by virtue of the act of 1866, and not by virtue of any judgment of the Probate Court. Such a statute constitutes an attempted exercise of the judicial power by the legislature; it is not for those who seek to uphold such exercise of power to say that it is not judicial because not employed after due notice, or a trial of any issue of law or fact.

It may be claimed, however, that the statute of 1866 is strictly remedial; that it goes only to the curing of irregularities, and does not extend to matter of jurisdiction within the rule which prohibits such legislation. On this point it has been said: "We know of no better rule to apply to cases of this description than this: If the thing wanting, which failed to be done, and which constitutes the defect in the proceedings, is something which the legislature might have dispensed with the necessity of by prior statute, then a subsequent statute dispensing with it retrospectively must be sustained." Cooley's Const. Lim. 371.

It may be admitted, perhaps, that a general law would be valid which authorized executors or administrators to obtain orders of sale on *ex parte* applications; or to sell real property, for the payment of debts, without notice to the heir, or application to any court. Possibly, also, a special law, to the effect last mentioned — (held not to be an exercise of judicial power in *Watkins v. Holman*, 16 Pet. 61) — might not be a violation of any part of our Constitution except the provision: "All laws of a general nature shall have a uniform operation." But it has been expressly decided in this State that the legislature cannot authorize a sale by an executor or administrator, except in satisfaction of the liens of creditors, or for the support of the family, or expenses of administration. *Brenham v. Story*, 39 Cal. 179. And when such prospective laws providing for a sale to pay debts have been sustained, it has been held that they decide no fact binding upon heirs, devisees or creditors; but as to them the executor or administrator acts subject to an accountability in a court of chancery for the correct performance of his trust in this as in other parts of his duty. 16 Pet. 62.

It may be doubted whether, under the Constitution, which distributes the judicial power throughout a system of courts, the question of the ex-

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istence or non-existence of debts, etc., could be referred to the District Court to be determined only when suit was brought by heirs or devisees to make the executor or administrator responsible for the abuse of his trust. However this may be, it is quite certain that the jurisdiction to inquire into the existence of debts may be, by the general probate law has been, placed in the Probate Court, and the effect of the statute of 1866 — if it be held effective at all — is to make a void judgment valid.

We say, then, that the question as to the existence of debts, insufficiency of personalty, etc., and consequent necessity for a sale of real property, is a judicial question, and the legislature cannot decide it. If it be alleged that the legislature has not attempted to decide it, the reply is, that the statute of 1866 has left to the heirs or devisees no defense against a title asserted by a purchaser at such sale, except *actual fraud* or collusion between the purchaser and executor or administrator; that by its terms no remedy is given to the heirs or devisees against the executor or administrator personally; but, on the contrary, the very object of the statute, as claimed by the appellants herein, is to validate the whole proceeding and make it as effectual in law as if it had been conducted in precise compliance with the statutes; that, assuming the statute to be applicable to void judgments and sales, the purpose is perfectly apparent: to validate such judgments and sales, without reference to the existence of debts, and in spite of their non-existence. This the legislature was powerless to do, because, to apply the rule as laid down by Judge COOLEY, "the thing wanting" was not a thing which the legislature "might have dispensed with the necessity of by prior statute."

If it can be said, in any sense of the words, that the act of 1866 is not the exercise of judicial power, it is only because there is provided in it no pretense of judicial inquiry, no day in court for the parties to be affected by it, no course of investigation, no saving of private rights, or recognition of the principles of distributive justice.

If for such reasons the statute is not an exercise of judicial functions, then, as was said by the Supreme Court of Massachusetts, "it certainly is a violation of another fundamental principle of the Constitution. It takes from the subject his property, not by due process, or by the law of the land, but by an arbitrary exercise of the legislative will." *Denny v. Mattoon, supra*. Prior to 1848, the courts of Pennsylvania had often decided that a testator's "mark" at the foot of a testamentary paper was not a valid signature; had repeatedly construed their statute of wills as the California courts (prior to the act of 1866) had repeatedly construed our statute relating to sales of lands by executors or administrators. To "overrule" these decisions, as Mr. Sedgwick aptly expresses it (Stat. and

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Const. Law, §49), the legislature of Pennsylvania, in 1848, passed an act declaring that every will theretofore made, to which the testator had made his mark, should be valid. In *Greenough v. Greenough*, *supra*, GIBSON, C. J., said: "How this mandate to the court to establish a particular interpretation of a particular statute can be taken for any thing else than an exercise of judicial power in settling a question of interpretation, I know not." And, in the same case: "The statute is destitute of retroactive force, not only because it is an act of judicial power, but also because it contravenes the declaration in the Constitution, that no person shall be deprived of life, liberty or property, except by the judgment of his peers, or the law of the land."

Our conclusion is, that the act of April 2, 1866, is in conflict with the provision of the Constitution of the State which prohibits the legislature from exercising judicial functions; that it also contravenes the provision that no person can be deprived of his property without due process of law, and that it is, therefore, void.

The purchaser "in good faith" mentioned in the statute could only be one who bought in ignorance that the sale was invalid in law, and who in that respect was in the same position as all who part with their money in ignorance of their legal rights. If he, or his assignee, shall complain of the hardship of losing the purchase-price, it can only be said — however the fact may be regretted — that the hardship was suffered before the act of 1866 was passed, and was the consequence of an existing rule of law and of his own ignorance of that rule. From September 19, 1853, to April 2, 1866, a period of nearly thirteen years, the purchaser, or his grantee, had no right, title, or interest in the land; and if he had any right of action against Forster or the heirs to recover the money paid, he did not assert it. The hardship, if any, therefore, is not inflicted by the act of this court in simply discharging its duty of declaring the statute of none effect.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

DÖRING, plaintiff in error, v. THE STATE.

(49 Ind. 56.)

Arrest — may be made by police officer for felony without warrant.

A police officer has a right to arrest without a warrant, where he has reasonable or probable cause to believe a felony has been committed, and he will be justified for an assault upon one endeavoring to assist the arrested person in escaping without showing that such person was guilty of the offense charged. (*See note, p. 672.*)

INDICTMENT for assault and battery. The facts appear in the opinion.

C. Denby and D. B. Kumler, for appellant.

C. A. Buskirk, Attorney-General, B. Hynes, and R. D. Doyle, for the State.

BUSKIRK, C. J. This was an indictment against the defendant for an assault and battery upon the body of one Thomas Green. There was a trial by jury, a verdict of guilty, assessing a fine of one cent. There was a motion for a new trial, which was overruled, a motion in arrest of judgment, which was also overruled, and the court rendered judgment on the verdict.

The defendant was a policeman of the city of Evansville, and as such was informed that a brother of the prosecuting witness, Jim Green by name, had stolen a box of cigars. Upon that information, he arrested said Green. He was taking the prisoner to the city prison, and on his

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way there passed the house of the prosecuting witness. The prisoner expressed a desire to see his brother, the prosecuting witness, and was told by the defendant that he could see him outside the house.

All the persons present agree in their testimony, that the prisoner attempted to either go into the house or escape, and that the appellant knocked him down twice with his mace. In the scuffle that ensued, the appellant and the prisoner got around the corner of the house of the prosecuting witness, about ten feet from the corner. At this point of time, the prosecuting witness heard the noise and went out and placed his hand upon the shoulder of the appellant, and turned him around to the gas-light. The theory of the State is, that the prosecuting witness heard the noise and went out to stop it, without knowing who the parties were, and that he gently laid his hand upon the appellant and turned him around to the gas-light to see who he was. On the other hand, it is contended that the prosecuting witness knew who the parties were, and went out to aid his brother in escaping. All the witnesses agree that he laid his hand on the officer before he was struck. The appellant struck him over his head with a mace. It is further argued that it can make no difference what the real purpose of the prosecuting witness was, if the appellant had reason to believe, and did believe, that his purpose was to aid in the escape of his brother. The prisoner did, in fact, make his escape.

[The court here consider the question whether a policeman's mace is a dangerous weapon.]

It is also claimed that the court erred in giving the following instruction: "If the defendant made the arrest of James Green for a felony, on information and not on view, he made it at his own peril; and in order for him to justify the assault upon Thomas Green, the prosecuting witness, when it becomes a matter of inquiry, it devolves upon the defendant to show that the party under arrest was guilty of the crime for which he was arrested."

In our opinion the instruction was clearly erroneous.

It never was necessary under the law for a peace officer to "show that the party under arrest was guilty of a crime for which he was arrested." A peace officer has a right to arrest without a warrant, when he is present and sees the offense committed. He has a right to arrest without a warrant, on information, where he has reasonable or probable cause to believe that a felony has been committed; and herein there is a distinction as to the extent of his authority. In cases of misdemeanor, the officer must arrest on view or under a warrant; in cases of felony, he may arrest without a warrant, upon information, where he has reason-

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able cause. And the reasonable or probable cause is an absolute protection to him, "when it becomes a matter of inquiry," and in no case is he bound to establish the guilt of the party arrested. 1 Hilliard on Torts (2d ed.), 233, 234, 235, and notes.

In *Halley v. Mix*, 3 Wend. 350, the court held: "If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without a warrant, such arrest is illegal though an officer would be justified if he acted upon information from another which he had reason to rely on."

In *Samuel v. Payne*, 1 Doug. 359, Lord MANSFIELD held that if any person charge another with felony, and desire an officer to take him in custody, such charge will justify the officer, though no felony was committed.

In a MS. note of a case of *Williams v. Dawson*, referred to by counsel in *Hobbs v. Branscomb*, 3 Camp. 420, Mr. Justice BULLER laid down the law, that "if a peace officer of his own head takes a person into custody on suspicion, he must prove that there was such a crime committed; but that if he receives a person into custody, on a charge preferred by another of felony or breach of the peace, there he is to be considered as a mere conduit, and if no felony or breach of the peace was committed, the person who preferred the charge alone is answerable."

In *Hobbs v. Branscomb*, *supra*, Lord ELLENBOROUGH, in speaking of the rule laid down by Judge BULLER, said: "This rule appeared to be reasonable, and that very injurious consequences might follow to the public, if peace officers, who ought to receive into custody a person charged with a felony, were personally answerable, should it turn out in point of law no felony had been committed."

In 1 Chit. Crim. Law, 22, the law is stated thus: "Constables are bound, upon a direct charge of felony, and reasonable grounds of suspicion laid before them, to apprehend the party accused, and if upon a charge of burglary, or other felony, he be required to apprehend the offender, or to make hue and cry, and neglect so to do, he may be indicted. And a peace officer, upon a reasonable charge of felony, may justify an arrest without a warrant, although no felony has been committed because, as observed by Lord HALE, the constable cannot judge whether the party be guilty or not, till he come to his trial, which cannot be till after his arrest; and, as observed by Lord MANSFIELD in *Samuel v. Payne*, if a man charges another with a felony, and requires an officer to take him into custody, and carry him before a magistrate, it would

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be most mischievous that the officer should be bound first to try, and, at his peril, exercise his judgment on the truth of the charge : he that makes the charge should alone be answerable ; the officer does his duty in conveying the accused before a magistrate, who is authorized to examine, and commit, or discharge."

The law applicable to arrests by a private person is stated with great precision and clearness by TILGHMAN, C. J., in *Wakely v. Hart*, 6 Binn. 316, where, after quoting a provision of the State Constitution and commenting thereon, it is said : " But it is nowhere said that there shall be no arrest without warrant. To have said so would have endangered the safety of society. The felon who is seen to commit murder or robbery must be arrested on the spot or suffered to escape. So although not seen, yet if known to have committed a felony, and pursued with or without a warrant, he may be arrested by any person. And even when there is only probable cause of suspicion, a private person may without warrant at his peril make an arrest. I say at his peril, for nothing short of proving the felony will justify the arrest. These are principles of the common law, essential to the welfare of society, and not intended to be altered or impaired by the Constitution."

We think the instruction under examination, when applied to arrests by a private person, expresses the law correctly, but when applied to arrests by peace officers, is clearly erroneous.

[Whether appellant possesses the powers of a police officer is considered.]

The judgment is reversed with costs ; and the cause is remanded for a new trial, in accordance with this opinion.

Ordered accordingly.

NOTE.—See a careful discussion of the law of arrest without warrant, 1 Alb. L. J. 28, 58, 149. See also *Wade v. Chuffee*, 8 R. L. 224; S. C., 5 Am. Rep. 572; *Commonwealth v. Tobin*, 108 Mass. 426; S. C., 11 Am. Rep. 375; *Rafferty v. People*, 64 Ill. 111; S. C., 18 Am. Rep. 601.—RER.

Fletcher v. The State.

FLETCHER, plaintiff in error, v. THE STATE.

(49 Ind. 124.)

Witness — impeachment of, in criminal trials — defendant as witness.

Where, under a statute allowing one charged with crime to testify in his own behalf, an accused person becomes a witness, the prosecution may show that his reputation for truth and veracity is bad, but cannot impeach his general moral character.*

INDICTMENT for forgery. The opinion states the facts.

H. C. Fox and D. W. Mason, for appellant.

C. A. Buskirk, Attorney-General, D. W. Comstock, Prosecuting Attorney, and W. A. Bickle, for the State.

BUSKIRK, C. J. George W. Williams and Robert B. Fletcher were jointly indicted in the court below for having forged a certain mortgage, a copy of which is set forth at full length in the indictment, and appears in the record.

[Several immaterial points of practice are considered and passed upon.]

Upon the trial of the cause below, the defendant offered no evidence of his general character, but chose to rest upon the presumption which the law indulged in his favor. He went upon the stand as a witness, and testified in his own behalf. After he had closed his evidence, the State introduced a witness who, in answer to a question propounded to him, testified that he knew the general character of the appellant, and that it was bad. The matter is thus stated in the bill of exceptions: "To each and every of said questions, before the same were answered, the defendant then and there objected, for the reason that the defendant had offered no testimony touching his general reputation, nor put the same in issue, and that if such evidence was offered for the purpose of discrediting him (said defendant) as a witness, the same should be confined to general reputation for truth and veracity."

The law invests every person accused of crime with a presumption in favor of good character, and the State cannot offer evidence to impeach such character until the accused has put his general character in issue by offering evidence in support of it. The presumption in favor of good character continues, and must be indulged, as long as the accused

* See *Commonwealth v. Nichols*, ante, p. 345 and note.

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rests upon such presumption ; but when he abandons the shield which the law has thrown around him, and attempts by affirmative evidence to prove, as a fact, that his general character is good, he opens the door for the admission of evidence on the part of the State to prove that his character is bad.

The law also indulges a presumption in favor of the good character of witnesses, and the party producing them cannot offer evidence in support of such character until the adverse party puts such character in issue in some of the modes known to the law.

In the case of a defendant, he must put his character in issue, but in the case of a witness, the adverse party must put his general character in issue.

These were familiar principles, well known to the profession prior to the passage of the act of March 10th, 1873, which gave to a defendant in a criminal cause the privilege of testifying in his own behalf. We are required, for the first time, to determine what changes, if any, have been produced in the rules of practice by the passage of said act. Prior to such enactment, the rights of a defendant and the privileges of a witness were separate and distinct ; but since its passage, a defendant who elects to testify occupies the position of both defendant and witness, and thus he combines in his person the rights and privileges of both. But while this is true, we do not think it should result in any change in the law or rules of practice. In his capacity as a witness, he is entitled to the same rights, and is subject to the same rules, as any other witness. In his character of defendant, he has the same rights, and is entitled to the same protection, as were possessed and enjoyed by defendants in a criminal cause before the passage of the act in question. When we are considering the rights of the appellant in his character of defendant, we lose sight of the fact that he has the right to testify as a witness ; and when his privileges as a witness are called in question, they should be decided without reference to the fact that he is a defendant also.

It necessarily results, from what has been said, that the State had no right to assail the general character of the appellant, as one accused of crime, for the reason he had not put his character in issue.

It is conceded by counsel for appellant, that the State had the right to impeach the appellant, as a witness, by proving that his general character for truth and veracity was bad in the neighborhood of his residence ; but it is very strenuously contended that the State had no right to prove what his general moral character was, to impeach him as a witness.

The solution of this question depends upon whether the last clause

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of section 242 of the Civil Code (2 G. & H. 171) applies to a trial of a criminal cause. That clause reads: "In all questions affecting the credibility of a witness, his general moral character may be given in evidence."

It was held by this court, in *Miller v. The State*, 8 Ind. 325; *Quinn v. The State*, 14 id. 589; *Harman v. The State*, 22 id. 331; *McLaughlin v. The State*, 8 id. 281; *Hooper v. The State*, 9 id. 572, and *Miller v. The State*, 42 id. 544, that the provisions of the Civil Code do not necessarily govern in criminal practice, yet that it is reasonable to consult them, in absence of special provisions in the Criminal Code in establishing rules. In the present case, we are required to decide the question squarely, whether a witness in a criminal cause may be impeached by proof of his general moral character; because, upon the trial below, the appellant demanded of the court to restrict and limit such testimony to his general character for truth and veracity; but the court overruled the objection, and permitted an inquiry to be instituted into his general moral character.

The statute in question is an innovation upon the common law, and should be strictly construed. It is settled, by a very decided preponderance of authority, that when the purpose was to impeach a witness, the inquiry was confined to general reputation for truth and veracity; and when the purpose was to inquire into the character of the defendant, the inquiry was generally limited to that trait of character which had some relevancy to the question in issue. Thus, it was said by the court, in *Boon v. Weathered*, 23 Texas, 682, that "when a man's honesty is in question, his veracity is not in question. When his veracity is in question, one cares not to know whether he be of a peaceable, or of a quarrelsome disposition. If the question is concerning honesty, the inquiry should be concerning honesty. If the question be one of veracity, the inquiry should be directed to the point at issue."

In the case of *The United States v. Van Sickle*, 2 McLean's Cir. Ct. 219, the rule is stated with great force. It is there said: "The object of the examination is to shake and overthrow the credit of the witness. Now, this is effectually done by showing that in the neighborhood in which he lives, and where his character is best known, he is not considered worthy of credit. Shall a public opinion, which does not reach his credibility, be proven as a fact from which the jury may infer a want of credibility? This would be an inference from public opinion which had not been drawn by the public. It would be a conclusion inferred, not from original facts, but from an opinion formed

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on those facts by the public. It would be an inference on an inference. This would be a new rule, not yet incorporated, it is believed, into the law of evidence."

In *Atwood v. Impson*, 5 C. E. Green, 150, it is said: "With many, telling the truth is a habit and a principle which they adhere to always, though they may indulge in drinking, swearing, gambling, roystering, and making close bargains. With others, lying is the habit, or principle, and if elevated to be senators or legislators, or made church members or deacons, it does not always reform them."

We cite, as sustaining the proposition, that, at common law, the inquiry into the general character of a witness was limited to truth, the following authorities: *Teese v. Huntingdon*, 23 How. (U. S.) 2; *The United States v. Van Sickle*, 2 McLean, 219; *Gass v. Stinson*, 2 Sumner, 605; *Gilbert v. Sheldon*, 13 Barb. 623; *The People v. Rector*, 19 Wend. 569; *Jackson v. Lewis*, 13 Johns. 504; *The State v. Bruce* 24 Me. 71; *Commonwealth v. Moore*, 3 Pick. 194; *Morse v. Pineo*, 4 Vt. 281; *State v. Smith*, 7 id. 141; *Spears v. Forest*, 15 id. 435; *The State v. Randolph*, 24 Conn. 363; *State v. Howard*, 9 N. H. 485; *Gilchrist v. M'Kee*, 4 Watts, 380; *Chess v. Chess*, 1 Penn. 32; *Uhl v. Commonwealth*, 6 Gratt. 706; *Ward v. The State*, 28 Ala. 53; *Ford v. Ford*, 7 Humph. 92; *Jones v. The State*, 13 Texas, 168; *Craig v. The State*, 5 Ohio St. 605; *Wike v. Lightner*, 11 S. & R. 198; *Bucklin v. The State*, 20 Ohio, 18; *Thurman v. Virgin*, 18 B. Mon. 785; *Perkins v. Mobley*, 4 Ohio St. 668; *Bates v. Barber*, 4 Cush. 107; *Ayres v. Duprey*, 27 Texas, 593; *Noel v. Dickey*, 3 Bibb, 268; *Webber v. Hanke*, 4 Mich. 198; *Patriotic Bank v. Coote*, 3 Cranch's C. C. 169; *United States v. Masters*, 4 id. 479; *United States v. White*, 5 id. 38; *The United States v. Dickinson*, 2 McLean, 325; *Atwood v. Impson*, 5 C. E. Green, 150; *Newman v. Mackin*, 13 Sm. & M. 383; *Quinn v. The State*, 14 Ind. 589; Whart. Crim. Law, § 814; Taylor on Ev., § 1083.

We are of opinion that the rule of practice established by the legislature in civil cases should not be applied to criminal causes.

The effect of an adverse ruling would be to put a defendant's general moral character in issue, without his consent, which would necessarily and unavoidably prejudice him in his defense of the charge for which he is being tried.

The evidence under examination was improper, as affecting the character of the accused, because he had not put his character in issue; and it was improper for the purpose of impeaching the appellant as a witness, for the reason that in a criminal cause a witness cannot be impeached or sustained by proof of general moral character.

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The appellant introduced evidence of the general reputation for truth and veracity of George W. Williams, for the purpose of impeaching him as a witness, and the State, to sustain him, introduced evidence of his general moral character. This, according to the rule above laid down, was improper.

[The remainder of the opinion is devoted to the consideration of matters of practice.]

Judgment reversed and new trial ordered.

GALLOWAY, appellant, v. STEWART.

(49 Ind. 156.)

Malicious prosecution — when probable cause no defense.

It is no defense to an action for malicious prosecution that there was probable cause for supposing that plaintiff was guilty of the crime for which he was prosecuted, if defendant did not at the time know of the facts constituting the probable cause.

ACTION by the appellee against Galloway, Meadows, Trogden, and Stafford, the appellants, for maliciously prosecuting the plaintiff, before a United States commissioner, for carrying on the business of distilling without a license.

Issues, trial by jury, verdict for plaintiff, motion for a new trial overruled, and final judgment for the plaintiff. Error assigned, overruling the motion for a new trial.

S. Claypool, J. L. Mitchell, W. A. Ketcham, G. W. Friedley, and P. A. Parks, for appellants.

C. F. McNutt, for appellee.

DOWNEY, J. The first question presented is with reference to the refusal of the following instruction asked by the defendants: "If facts existed which would have justified the charge made, showing probable cause, it makes no difference whether the defendants knew it at the time of making the charge or not."

The court not only refused the above instruction, but gave this: "Acts of guilt, which have been proven, if any, against the plaintiff, which were not known by the defendants at the commencement of the prosecu-

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tion, are not to be considered in establishing 'probable cause' — they are now introduced for the purpose of proving the plaintiff's guilt."

If the defendant in the action for malicious prosecution proves that the plaintiff in that action was guilty of the crime charged against him, it is immaterial with what degree of malice the prosecution was commenced and carried on; the defense is complete; and this is true, although the plaintiff in the civil action was acquitted in the criminal prosecution. *Adams v. Lisher*, 3 Blackf. 241, 445; *Fashay v. Ferguson*, 2 Denio, 617.

But the question remains, can the defendant in the civil action defend himself, supposing that the plaintiff in the civil action was not guilty of the crime, by showing that there was in fact probable cause, although he did not know of the existence of the facts constituting the probable cause at the time of making the charge? We think he cannot. When the guilt of the plaintiff of the crime charged is shown, probabilities are at an end.

The doctrine concerning probable cause must relate more especially to cases where the guilt of the plaintiff of the crime charged is not shown by the evidence, but is only rendered probable from the circumstances disclosed. That the facts constituting probable cause must be known to the party preferring the charge is expressly stated in some of the cases in this court, and is clearly implied in others.

In *Lacy v. Mitchell*, 23 Ind. 67, it was said: "Probable cause may be defined to be that apparent state of facts found to exist upon reasonable inquiry; that is, such inquiry as the given case rendered convenient and proper, which would induce a reasonably intelligent and prudent man to believe the accused person had committed, in a criminal case, the crime charged; and, in a civil case, that a cause of action existed."

Knowledge of the facts by the prosecutor is clearly implied in this statement of what constitutes probable cause.

In *Hays v. Blizzard*, 30 Ind. 457, it is said: "But where the facts known to the prosecutor, or the information received by him from sources entitled to credit, are such as to justify the belief, in the mind of a person of reasonable intelligence and caution, that the accused is guilty of the crime charged, and the prosecution is induced thereby, such a state of facts constitutes probable cause, though it may subsequently appear that the accused is innocent."

Here, knowledge, or information entitled to credit, is made an essential part of the definition of probable cause. See, also, *Bacon v. Towne*, 4 Cush. 238, referred to in the opinion in the last cited case, and *Addison on Torts*, 613.

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In *Turner v. Ambler*, 10 Q. B. 252, Lord DENMAN, C. J., said: The prevailing law of reasonable and probable cause is, that the jury are to ascertain facts, and the judge is to decide whether those facts amount to such cause. But among the facts to be ascertained is the knowledge of the defendant of the existence of those which tend to show reasonable and probable cause, because without knowing them he could not act upon them; and also the defendant's belief that the facts amount to the offense which he charged, because otherwise he will have made them the pretext for prosecution, without even entertaining the opinion that he had a right to prosecute. In other words, the reasonable and probable cause must appear not only to be deducible in point of law from the facts, but to have existed in the defendant's mind at the time of his proceeding; and perhaps whether they did so or not is rather an independent question for the jury, to be decided on their view of all the particulars of the defendant's conduct, than for the judge, to whom the legal effect of the facts only is more properly referred." See, also, *Delegat v. Highley*, 3 Bing. N. C. 950.

[The remainder of the opinion is devoted to immaterial matters.]

 IRWIN, appellant, v. HUBBARD.

(49 Ind. 350.)

Statute of Frauds — verbal promise to alter mortgage invalid.

F., who had executed a mortgage on real estate to H. to indemnify him, applied to B. to become surety for him, verbally promising to change the mortgage so as to secure B. (which change H. assented to and agreed to make). B. thereupon became surety and was obliged to pay the bond. *Held*, that the promise to alter the mortgage was within the Statute of Frauds and invalid.

ACTION to foreclose a mortgage. The facts appear in the opinion.

S. Stansifer, for appellants.

R. Hill and *J. W. Morgan*, for appellee.

WORDEN, J. The original action in this case was commenced by William W. Herod against the appellants herein, who, except Irwin, were the heirs at law of Milton Treadway, deceased. The action was brought to foreclose a mortgage on certain real estate, which the deceased in his

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life-time had executed to Herod, to indemnify and save him harmless from a liability which he had incurred by executing a certain promissory note, as the surety of the deceased, to one Joseph D. Sidener.

The appellee, Hubbard, on his petition, was made a party to the action and filed his cross-complaint as follows, viz. :

" Charles A. Hubbard, having heretofore been by leave of the court admitted as a party defendant herein, for his answer and cross-complaint herein says that after the execution and delivery of said mortgage to plaintiff, one Kendall M. Hord instituted an action against said Milton Treadway before one George W. Arnold, a justice of the peace of said county, wherein such proceedings were had, that, on the 24th day of February, 1873, said Hord obtained judgment against said Treadway for the sum of one hundred and seventy-seven dollars and sixty-two cents, together with costs, taxed at two dollars and forty-five cents, from which judgment, said Treadway, being desirous of taking an appeal to this court, applied to said Hubbard to become his surety on an appeal bond, for the purpose of so appealing from said judgment as aforesaid, and informed said Hubbard that said Herod held the mortgage now sued on, and that the property covered by said mortgage was amply sufficient to secure the sum for which said Herod had taken the same, and also the liability which said Hubbard would incur by becoming surety on said appeal bond, and that if said Hubbard would become surety on said appeal bond, he would arrange with said Herod that said mortgage should be so changed that said Hubbard should be included therein ; and by the terms thereof, as so changed, said Hubbard should be fully indemnified for any loss he might sustain by reason of becoming surety on said appeal bond, as aforesaid. And thereupon said Hubbard and said Treadway went together to said Herod, and it was then and there mutually agreed between said Herod, said Hubbard, and said Treadway, that said mortgage should be so changed as to insert therein a provision that said Hubbard should be indemnified for and on account of any loss or damage that said Hubbard might sustain by reason of said appeal bond and his connection therewith ; and that such verbal changes should be made in said mortgage as would be necessary and proper to set forth the said security and indemnity of said Hubbard by said mortgage, in fit and appropriate language ; and said Herod being learned in the law, at the earnest solicitations and request of both said Treadway and said Hubbard, undertook and promised to make such changes in said mortgage immediately thereafter as would set forth said security ; and said Hubbard, relying upon said promises and believing that said change had been or immediately would be made in said mortgage, executed said appeal bond pursuant to said request of

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said Treadway, and said cause was appealed to this court, where judgment was finally rendered in said action in favor of said Hord, for — dollars and costs, taxed at — dollars; and by reason of his said suretyship on said bond, said Hubbard was compelled to and did pay the sum of two hundred and ten dollars and forty cents. Said Hubbard avers that said Treadway departed this life on the — day of —, 1873, and that said Irwin is administrator of his estate, and that the other defendants herein are heirs at law of said Treadway, and that the estate of said Treadway is wholly insolvent; wherefore said Hubbard prays that said mortgage be so reformed as to set forth said agreement of said parties in regard to the indemnity of said Hubbard as aforesaid, and that said mortgage when so reformed be foreclosed, and that said premises be sold to satisfy the indebtedness of said Herod and said Hubbard, or such *pro rata* part thereof as the proceeds of such sale may amount to, if insufficient to satisfy the whole of both said claims, and for all other proper relief.”

To this cross-complaint the administrator demurred for want of sufficient facts, but the demurrer was overruled, and an exception was taken. Such further proceedings were had as that the mortgage was foreclosed in favor of Herod, the original plaintiff, and changed in favor of Hubbard, in accordance with the agreement alleged in the cross-complaint, and foreclosed in his favor, giving Herod priority. Herod, therefore, has no interest in this appeal.

The administrator assigns for error the overruling of his demurrer to the cross-complaint, and the heirs that the cross-complaint does not state facts sufficient, etc. Thus the sufficiency of the cross-complaint of Hubbard is questioned here.

The agreement to so change the mortgage which Herod held against Treadway as to render it a security in favor of Hubbard, to indemnify him against the liability he was about to incur by entering into the appeal bond, was, so far as the statute of frauds is concerned, equivalent to an agreement to execute a new mortgage. That the agreement was within the statute of frauds, we think, admits of but little controversy. Browne on Stat. Frauds, § 267. The author, at the section cited, says: “Not only is an agreement to execute a mortgage invalid without writing, but also an agreement to make a defeasance to an absolute conveyance, or to convert a written mortgage into a conditional sale.”

In the case of *Olabaugh v. Byerly*, 7 Gill, 354, it was held, that “a mere parol agreement to execute a mortgage is one of which a court of chancery can take no notice, and, of course, cannot regard it as performed.”

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In 3 Powell on Mort. 1050c, it is said : " To put a case of pure oral contract — if A. agree with B. in presence of their common solicitor, to make a mortgage for a sum which B. advances, or for a debt due from A. to B., and A. delivers to the solicitor title deeds to assist him in preparing the mortgage, which is prepared accordingly, yet A. may resist specific performance of his contract, and B. will have no relief in equity."

In *Curle's Heirs v. Eddy*, 24 Mo. 117, it was held, that a parol agreement to the effect that real estate, the title to which had been previously taken as a security, should stand as a security for further advances, is within the statute of frauds and consequently void.

So, in *Castro v. Illies*, 13 Texas, 229, it was held, that a parol agreement that certain real estate should be substituted in a mortgage for certain other real estate described therein is void under the statute of frauds. See, also, *Williams v. Hills*, 19 How. 246, 250.

We do not understand that counsel for the appellee insist that the contract is not within the statute ; but they insist that it has been so far part performed as to be taken out by a court of equity, and that the non-performance is such a moral fraud that a court of equity will not permit the appellants to take advantage of the statute. We are not able to see any legal fraud in the case. Treadway failed, perhaps we may say refused, to comply with his contract. If that is such a fraud as would prevent him or his heirs from taking advantage of the statute, the statute itself, in respect to this class of contracts, becomes a dead letter.

Hubbard, doubtless, executed the appeal bond on the faith of the agreement that the mortgage should be so changed as to furnish him indemnity. He relied upon the promise, and the promise was broken. There was no other fraud in the case than such as is involved in all breaches of contract.

The case cannot be distinguished in principle from that of *Montacute v. Maxwell*, 1 P. Wms. 618. There, the defendant had agreed with the plaintiff, before their intermarriage and in consideration thereof, that the plaintiff should enjoy all her own estate to her separate use, and had agreed to execute writings to that purpose, and had instructed counsel how to prepare the writings. When they were to be married, the writings not being prepared, the defendant desired that this might not delay the match, and engaged upon his honor that she should have the same advantage of the agreement as if it were a writing drawn in form by counsel, and executed. On a bill filed by the wife, the defendant pleaded the statute of frauds, by which " all promises in consideration of marriage, unless signed in writing by the party, are made void." The Lord Chancellor said : " In cases of fraud, equity should relieve, even against

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the words of the statute ; as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former, in this or such like cases of fraud, equity would relieve ; but where there is no fraud, only relying upon the honor, word or promise of the defendant, the statutes making these promises void, equity will not interfere."

This case is in point not only upon the question of fraud, but also upon that of part performance. We take it that when the plaintiff in that action married the defendant, she quite as effectually performed her part of the contract as the appellee in this case did when he signed the appeal bond.

There has been no part performance of the agreement that will take the case out of the statute. The case is certainly no stronger than where the purchase-money has been paid for land, and this has never, of itself, been held sufficient to take a case out of the statute. See, on the general subject, the case of *Sands v. Thompson*, 43 Ind. 18.

We are of opinion that the agreement set up in the cross-complaint is void by the statute of frauds, not being in writing, and that no facts are averred that take it out of the statute.

The judgment below in favor of Hubbard, the appellee, is reversed, with costs, and the cause remanded.

Ordered accordingly.

LACY, appellant, v. WEAVER.

(49 Ind. 373.)

Replevin — of wheat due for rent.

Plaintiff leased wheat-land to defendant, defendant agreeing to pay as rent one-half the wheat-crop at threshing-time. When the wheat was threshed defendant delivered only one-third, retaining the remainder. *Held*, that plaintiff could not replevy the balance of wheat due him under the lease.

ACTION by appellant against appellee, to recover the possession of two hundred and forty bushels of wheat. The complaint was in the usual form. The appellee answered by a denial.

The cause was submitted to the court for trial, who, at the request of the parties, rendered a special finding of facts, and stated the conclusions of law thereon. The special finding was as follows :

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“ That in the fall of 1872, the plaintiff leased by parol to the defendant about seventy acres of wheat-land, in Hamilton county, in consideration that the defendant would pay him one-half of the wheat, as rent, the wheat to be delivered in the bushel to the plaintiff, on the farm where raised, in the summer or fall of 1873, at threshing-time. In pursuance of the contract, the defendant took possession of the land, sowed, harvested, and threshed the wheat crop in the fall, of 1873, and delivered to the plaintiff one-third of the same, and refused to deliver any more, under the claim that that was all the plaintiff was to have under the contract. The plaintiff demanded the residue of his half of the wheat from the defendant, and on his refusal to comply with the demand brought this suit. The plaintiff replevied fifty-six bushels of the wheat out of the wagon in which the defendant was hauling it to mill. He then, in company with the sheriff, went to a barn in which several hundred bushels of defendant's wheat was stored, and took out thirty bushels under the writ, which together with the fifty-six bushels before taken under the same writ, and the one-third delivered by the defendant at the threshing-machine, made one-half of the said wheat crop. The court further finds that at the time the wheat was threshed, the defendant set apart and delivered to the plaintiff one-third of the wheat, and no more, and that the wheat replevied, some eighty-six bushels in all, was never delivered or set apart by the defendant, or separated from his own share of the wheat; but was retained by him under a claim of ownership; and that the total value of the wheat replevied is one hundred and seven dollars and fifty-seven cents, and is now in plaintiff's possession under the writ.

“ Upon which said facts the court stated its conclusions of law to be, that the defendant is the owner, and entitled to the possession of the wheat, and entitled to the return of the same; and that he recover of the plaintiff one hundred and seven dollars and fifty cents.

The court thereupon rendered a judgment for the return of such wheat; and if the same cannot be returned, a judgment was rendered for the sum of one hundred and seven dollars and fifty cents, and costs.

The appellant excepted to the conclusions of law, and has assigned for error here that the court erred in its conclusions of law.

[A question of practice is here passed upon.]

D. Moss and F. M. Trissal, for appellant.

J. W. Evans and R. R. Stephenson, for appellee.

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BUSKIRK, J. The court found that the appellant, by the terms of the contract, was entitled to one-half of the wheat raised upon the leased premises; but the court further found, that the wheat was to be delivered in the bushel to the plaintiff, on the farm where raised, at threshing-time; that one-third of the wheat was set apart and delivered to the plaintiff; that the wheat which was replevied had never been delivered or set apart by the defendant, or separated from his own share of the wheat, but was retained by him under a claim of ownership.

It is quite evident from the facts found that the appellee was guilty of a breach of his contract, and that appellant had a right of action against him for the value of the wheat withheld; but the question which we are required to decide is, whether the appellant could maintain replevin for wheat which had never been delivered to him, and which had never been separated from the other wheat belonging to the appellee. The appellant claimed to be the owner, and entitled to the immediate possession of the wheat. Being the landlord and entitled to one-half of the wheat raised, the appellant had a joint interest with the appellee in the wheat raised, but as the wheat was to be harvested, threshed, and delivered by the appellee to the appellant in the bushel, and there having been no delivery of the wheat, the title thereto remained in the appellee, and hence the appellant was not the owner, and as the wheat claimed by the appellant had never been separated from the other wheat of the appellee, the appellant could not maintain replevin, because he was not entitled to any particular and ascertained portion of the wheat, the title and possession of which remained in the appellee. After the wheat was harvested, it remained the property of the tenant until it was threshed, measured, and one-half of it set apart for the landlord. So the appellant was not the owner or entitled to the possession of any specific or ascertained wheat. *Williams v. Smith*, 7 Ind. 559; *Chissom v. Hawkins*, 11 id. 316; *Fowler v. Hawkins*, 17 id. 211; *Hart v. The State, ex rel. Baker*, 29 id. 200; *Lindley v. Kelley*, 42 id. 294.

We invite especial attention to the case of *Lester v. East*, 49 Ind. 588, which was an action of replevin, and it was held that the plaintiff could not maintain the action, because there had been no delivery of the hogs, and hence the title remained in the vendor, and the vendee was not the owner or entitled to the possession of any particular or ascertained hogs.

Counsel for appellant refer us to the following cases: *Chissom v. Hawkins*, 11 Ind. 316; *Matlock v. Fry*, 15 id. 483; *Sands v. Taylor*, 5 Johns. 395; *Hammond v. Anderson*, 4 Bos. & P. 69; *Smith v. Surman*, 9 B. & C. 561; *Slubey v. Heyward*, 2 H. Bl. 504.

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In *Chissom v. Hawkins, supra*, the tenant was to pay as rent one thousand seven hundred bushels of corn. The tenant sold the corn. The landlord brought an action of replevin, and it was held, that the title remained in the tenant; and, as he had sold it to an innocent purchaser, the title passed by such sale, and the action could not be maintained.

The case of *Matlock v. Fry, supra*, was an action to recover the possession of standing corn, and the only question was, whether standing corn was personal property, and it was held it was. It does not appear from the opinion, by what right or title the plaintiff claimed to be the owner of the corn. There was nothing decided in that case that has any bearing upon the question involved here.

The case of *Sands v. Taylor, supra*, was an action of assumpsit for the value of a cargo of wheat. The entire cargo had been sold, and part delivered, when the purchasers refused to receive the balance, upon the ground that the wheat was unsound. The question in the case was, whether it was a sale by sample, with warranty that the whole corresponded with the sample, or whether it was an absolute sale of all the wheat which had been examined by the purchasers before the sale in the usual way.

The case of *Hammond v. Anderson, supra*, involved the right of stoppage *in transitu*. There a number of bales of bacon, then lying at a wharf, having been sold for an entire sum, to be paid for by a bill at two months, an order was given to the wharfinger to deliver them to the purchaser, who went to the wharf, weighed the whole, and took away several bales, and then became bankrupt; whereupon the vendor, within ten days from the time of sale, ordered the wharfinger not to deliver the remainder. By the custom of the trade, the charges of warehousing were to be paid by the vendor for fourteen days after the sale. It was held, that the vendee had taken possession of the whole, and that the vendor had no right to stop what remained in the hands of the wharfinger.

The case of *Smith v. Surman, supra*, involved the question of whether a sale of timber was within the statute of frauds. The case was fully reviewed and considered in the case of *Owens v. Lewis*, 46 Ind. 488, and need not be further noticed here.

The case of *Slubey v. Heyward, supra*, was an action of trover, for a quantity of wheat. Four questions were considered and decided, and they were: 1. What right passes by the indorsement of a bill of lading? 2. Whether the consignor, after the indorsement of the bill of lading for a valuable consideration, may stop the goods *in transitu*.

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3. What shall be deemed the end of the *transitus*? 4. Whether, when part of the goods have been delivered to the indorsee of the bill of lading, the master of the ship is justified in delivering the residue, after notice from the consignor not to deliver it.

It is quite obvious that none of these cases or the questions involved have any application to the present case, and need not be stated with greater particularity.

We think the court below committed no error in its conclusions of the law applicable to the facts found.

The judgment is affirmed, with costs.

Judgment affirmed.

HOLLINGSWORTH, appellant, v. SWEDENBORG.

(49 Ind. 378.)

Parent and child — mother not entitled to wages of infant child after her remarriage.

The mother of a minor child after remarrying *held* not entitled to recover for the services of such child in the absence of an agreement to pay her therefor.

ACTION for services. The facts appear in the opinion.

H. W. Chase, J. A. Wilstach, J. M. LaRue, and S. E. Ball, for appellant.

W. C. Wilson and J. H. Adams, for appellees.

DOWNER, J. Action by the appellees, husband and wife, against the appellant. The facts stated in the complaint are, that the female plaintiff was formerly the wife of one Johnson, who died, leaving a daughter by the said female plaintiff, named Christena; the widow, the female plaintiff, then intermarried with her co-plaintiff, Manuel Swedenborg; the mother entered into an agreement with the defendant that the daughter, then a minor, should work for the defendant for an indefinite time, at two dollars a week, which the defendant agreed to pay to the mother; the daughter worked for the defendant from the 5th day of October, 1867, until the 1st day of August, 1870, in all one hundred and forty-six weeks and five days; that the defendant refused to pay for the same, and still refuses, etc. Answer, a general denial, with an agreement that

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all matters which could be properly pleaded might be given in evidence under that issue.

Trial by jury and verdict for the plaintiffs. Motion for a new trial overruled, and judgment on the verdict. Errors alleged, overruling the motion for a new trial, and that in arrest of judgment.

The daughter testified, with reference to the contract, as follows: "My mother and Mr. Hollingsworth agreed that I should work for him at two dollars per week; I was present at the contract," etc.

The evidence does not show any express promise on the part of the defendant to pay the wages to the mother, as alleged in the complaint. The evidence shows that the defendant was allowed for clothing, money, etc., furnished to the daughter, so that, although the work would amount to over two hundred and ninety dollars, the verdict and judgment were for only one hundred and fourteen dollars and sixty-five cents. The defendant testified that he had paid the daughter the whole amount due from him. She had got married.

It seems to be settled that the father is entitled to the services of his minor children, or to the proceeds of their labor, if they work for others, while they are supported by him. 1 Bl. Com. 453; *Jenison v. Graves*, 2 Blackf. 440. Independent of statutory enactment, there is no legal obligation on a parent to maintain his child. The common law considered the performance of the moral obligation and duty as better secured by the impulses of our nature than by legal enactments. The duty is one of imperfect obligation, that is, a duty for the enforcement of which the law provided no remedy. In England, except by virtue of an act of Parliament in the reign of Elizabeth, there was no remedy provided. By that statute, the duty was enforced by means of an assessment by the justices in quarter sessions, to be paid under a penalty of twenty shillings for every month that the party refused to pay. We have no such tribunal.

Mr. Chitty says: "Independently of the express enactment in the 43 Eliz., ch. 2, and other subsequent statutes, there is no legal obligation on a parent to maintain his child, and therefore a third person, who may relieve the latter even from absolute want, cannot sue the parent for a reasonable remuneration, unless he expressly or impliedly contracted to pay." He further says: "Though independently of an express contract, or one implied from particular facts, a father cannot be sued for the price of necessaries provided for his infant son, yet very slight circumstances will suffice to justify a jury in finding a contract on his part." Note 1 to p. 448, 1 Bl. Com.; *Kelley v. Davis*, 49 N. H. 187; 1 Cooley's Bl. 448, n. 2, and cases cited.

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Hence, we think the statement of the rule, with reference to the right of the father to the services of his minor child, making it dependent upon the condition that the child is maintained by the father, must be correct. For if the father does not maintain the child, and is under no obligation enforceable by law to do so, the child must, of necessity, be entitled to its own earnings, or have no means of subsistence. That the father's right is thus conditional upon his maintenance of the child, is expressly decided in *Farrell v. Farrell*, 3 Houst. (Del.) 633. GILPIN, C. J., says, in delivering the opinion :

“ Whilst it is the duty of a father to nourish, support and maintain his minor child, it is equally the duty of such child to obey and serve his father, in all that may be reasonably required of him. These duties are reciprocally binding upon the parties ; support and maintenance on the one hand and obedience and service on the other, the one being dependent upon, and compensatory of the other. And although the general principle is clear and unquestioned, that the father is entitled to the services of his minor child, and to all that such child earns by his labor, yet, it seems to be equally clear, that, as the right of the father to the services of the child is founded upon his duty to support and maintain his child, if he should fail, neglect, or refuse to observe and perform this duty, his right to the services of his child should cease to exist. And such we hold to be the law. I speak here of the civil rights and duties or obligations which belong to the relation of parent and child. Human laws deal with these alone. There are, undoubtedly, other and higher duties of a moral and religious nature growing out of this relation, which are beyond the cognizance of any human tribunal, and with which you, of course, have nothing to do, so far as this case is concerned.”

In *United States v. Bainbridge*, 1 Mason, 71, STORY, J., following the language of 1 Blackstone, 453, in substance, says :

“ By the common law, also, a father is entitled to the benefit of his children's labor, while they live with him, and are maintained by him, but this (as has been justly observed) is no more than he is entitled to from his servants.”

The right of the mother, when left a widow, to the services and earnings of a minor child is more doubtful than that of the father.

In *The O. & M. R. R. Co. v. Tindall*, 13 Ind. 366, where the mother had sued the railroad company for the killing of her son, it was said : “ We think the action maintainable in her name. She was the natural guardian of her infant son, after the death of his father, and as such, had the control of his person ; and, as he remained a member of her family, she had a right to his wages.” Here her right was conceded, but placed

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on the ground, among others, that the son remained a member of her family. Her right is recognized and stated in the same form in *Matthewson v. Perry*, 37 Conn. 435.

In *Gray v. Durland*, 50 Barb. 100, and *Simpson v. Buck*, 5 Lana. 337, it was decided, the latter case being based on the former, that the mother of an infant child whose father is dead may maintain an action for the services of the child, in cases in which the father, if living, might have sued.

On the contrary, in *Fairmount, etc., Co. v. Stutler*, 54 Penn. St. 375, it was decided that the mother was not bound for the maintenance of the minor son, and, in consequence, had no implied rights to his services. The same was held in *E. B. v. E. C. B.*, 28 Barb. 299.

In *Pray v. Gorham*, 31 Me. 240, it was said, by SHEPLEY, C. J. : "If it be intended to declare, that the mother, after the death of the father, is entitled to the earnings of a minor child, in the same manner as the father while alive was entitled to them, the position cannot be sustained." He cites, in support of his statement of the law, 1 Bl. Com. 453 ; *Commonwealth v. Murray*, 4 Binn. 487 ; *People v. Mercein*, 3 Hill (N. Y.), 400 ; *Morris v. Low*, 4 Stew. & P. 123.

On this point and to the same effect we cite *United States v. Bainbridge, supra*, and *Freto v. Brown*, 4 Mass. 675.

It seems to us, that considering these authorities *pro* and *con*, the right of the mother, at best, cannot be put on any ground more favorable to her than that stated in *The O. & M. R. R. Co. v. Tindall, supra* ; that is, that the mother has a right to the wages of her infant child, after the death of the father, so long as it remains a member of her family ; which implies, we think, that the child is being provided for by her.

As, in the case under consideration, the daughter was not a member of the family of the mother, or provided for by her, but, on the contrary, appears from the evidence to have been allowed to receive and appropriate to her own use the wages which she earned, she was entitled to such wages and her mother was not. It may be remarked, also, that in all the cases which we have found, where the mother was held entitled to the services and wages of the minor child, the mother has been a widow. We have found no case where the mother after marrying again has been held to be entitled to the services and wages of the minor children of the former marriage, earned after her marriage.

The stepfather cannot be made liable for the support of his wife's children by a former husband, and there would seem to be no good reason why he should, in an action in her name or in both of their names, recover the wages of the child.

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Had the minor daughter lived in the family of the stepfather, and been supported by him, he would have been entitled to her services, unless a contract to the contrary had been made. *Williams v. Hutchinson*, 3 Comst. 312; S. C., 5 Barb. 122.

Had there been an express promise by the defendant to pay the wages to the mother proved, perhaps the rule would have been different.

In *Pray v. Gorham*, *supra*, it is said: "A minor child may consent to become the servant of the mother, and she may make a contract with another person for his services, as she would for the services of any other person, who had for the time being become her servant, and may in such case recover for those services." *Clapp v. Green*, 10 Metc. 439, is cited in support of the statement. The complaint hardly brings the case within the rule thus stated, and we think it was sufficient. The evidence was not sufficient to justify the verdict of the jury.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the motion in arrest of judgment.

Ordered accordingly.

BAUMER, plaintiff in error, v. THE STATE.

(49 Ind. 544.)

Criminal law — incest between step-son and mother — joint offense.

By the statute of Indiana against incest, it is provided that "If any step-mother and her step-son shall have sexual intercourse together, having knowledge of their relationship, they shall be deemed guilty," etc. *Held*, that the knowledge of both parties was necessary to constitute the crime, and an indictment charging but one of the parties with having committed the act with knowledge was fatally defective.

INDICTMENT for incest. The facts are stated in the opinion.

A. B. Young, for appellant.

C. A. Buskirk, Attorney-General, for the State.

DOWNEY, J. This was a prosecution against the appellant for incest. The charge in the indictment is as follows:

"The grand jurors for said State of Indiana impaneled, charged and sworn in the Wayne Circuit Court to inquire within and for the body of the same said county of Wayne, upon their oath charge and present that

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Arthur Baumer, late of said county, at said county, on the 30th day of May, A. D. 1874, did then and there unlawfully have sexual intercourse with his step-mother, Augusta Baumer, then and there knowing the said Augusta Baumer to be his step-mother, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana."

The defendant moved the court to quash the indictment, but his motion was overruled, and he excepted. He then pleaded a special plea in bar, in which he alleged, "that the said grand jury, which found and returned the indictment, at the November term, 1874, of the said court, also found and returned at the same time into said court as a true bill and indictment against Augusta Baumer, charging that she, the said Augusta, on the — day of May, 1874, at said county, did unlawfully have sexual intercourse with her step-son Arthur Baumer (this defendant meaning), she, the said Augusta, then and there knowing that he, the said Arthur, was her step-son, which said Augusta Baumer so charged is the same Augusta Baumer named in the said indictment against this defendant, and the said Arthur Baumer named in the said indictment against the said Augusta was and is this defendant, and the act of sexual intercourse therein charged was the same act of sexual intercourse charged in said indictment against this defendant, and none other, and the offenses charged in the said two indictments so found and returned by the said grand jury were and are the same to all intents and purposes; and afterward, to wit, at the said November term of said court, the said Augusta Baumer, being arraigned in said court upon the said indictment found and returned against her as aforesaid, pleaded not guilty thereto, and the issue being joined in said cause between the State of Indiana and the said Augusta, the same came on for trial in said court, and was there tried by a jury duly impaneled in said court, and on said trial it was proved by competent evidence and beyond a reasonable doubt that the said Augusta, at the time of the said alleged sexual intercourse, had knowledge of the relationship existing between her and the said defendant; that she was at said time the step-mother of the said defendant, and he was her step-son; and there was no evidence given on said trial proving or tending to prove that the said Augusta was, at the time of the said alleged intercourse, or at any other time, insane, or of unsound mind, or incapable of understanding the criminal nature of said alleged act; and the said jury, having heard the evidence in the cause, and after due deliberation thereon, found and returned into said court their verdict in the words following, to wit: 'We the jury find the defendant not guilty;' and thereupon the said Augusta was discharged from said

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indictment, and the said prosecution against her was fully ended; wherefore the said defendant says that the State of Indiana ought not further to prosecute the said indictment against him, and he prays that he may be discharged therefrom."

The State demurred to this answer, the demurrer was sustained, and the defendant excepted. The prisoner then pleaded not guilty, the cause was tried by a jury, there was a verdict of guilty, with punishment of nine months' imprisonment in the county jail. Judgment was rendered accordingly.

The errors assigned bring in question the action of the court in overruling the motion to quash the indictment, and in sustaining the demurrer to the answer.

The statute on which the indictment is founded reads as follows:

"If any step-father shall have sexual intercourse with his step-daughter, knowing her to be such, or if any step-mother and her step-son shall have sexual intercourse together, having knowledge of their relationship, or if any parent shall have sexual intercourse with his or her child, knowing him or her to be such, or if any brother and sister, being of the age of sixteen or upwards, shall have sexual intercourse together, having knowledge of their consanguinity, every person so offending shall be deemed guilty of incest, and, on conviction thereof, shall be imprisoned in the State prison not less than two nor more than ten years, or may be imprisoned in the county jail not less than six nor more than twelve months." 2 G. & H. 452, § 45.

The section may be analyzed to advantage.

1. It declares, that "if any step-father shall have sexual intercourse with his step-daughter, knowing her to be such," he shall be guilty. Here the step-daughter is not legally guilty of any crime. The step-father is guilty, if he have knowledge that she is his step-daughter, and this is so whether she has knowledge that he is her step-father or not. The crime is separate and several on his part.

2. "If any step-mother and her step-son shall have sexual intercourse together, having knowledge of their relationship." This language, it will be perceived, is quite different from the preceding. It is required that they shall have sexual intercourse together, and that they shall both have knowledge of their relationship. In this case both parties to the act become guilty, and liable to punishment. The crime is a joint one, and one of the parties cannot be guilty unless the other also is guilty.

3. "If any parent shall have sexual intercourse with his or her child, knowing him or her to be such." In this case, the parent is the only party made criminally responsible. The crime is the separate and sev-

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eral crime of the parent, while the child is not punishable at all. Applied to persons sustaining this relation to each other, the law is like it is with reference to the relation of step-father and step-daughter.

4. "If any brother and sister, being of the age of sixteen or upwards, shall have sexual intercourse together, having knowledge of their consanguinity." Here, as under the second clause of the statute, the crime is joint. The parties must have intercourse together, with knowledge of their consanguinity.

The indictment in this case is on the second clause of the statute, and consequently we need only decide upon the proper construction of that part of the section. That its proper construction is that which we have already indicated, we think is reasonably clear, upon the language of the statute itself.

We are referred by counsel for appellant to, and cite in support of this construction of the statute, the following authorities: Bishop's Stat. Crimes, §§ 731, 721, and 702; *The State v. Byron*, 20 Mo. 210; *Noble v. The State*, 22 Ohio St. 541; *Delany v. The People*, 10 Mich. 241. In the last-named case the information was on a statute, the language of which, so far as it affected the case in judgment, was as follows: "If any man and woman, not being married to each other, shall lewdly and lasciviously associate and cohabit together, * * every such person shall be punished," etc. It was held that the offense was joint, and that both of the parties must be guilty, or neither.

The indictment in the case which we are considering alleges only that the defendant "did unlawfully have sexual intercourse with his step-mother, Augusta Baumer, then and there knowing the said Augusta Baumer to be his step-mother." Such an allegation of the crime might have been good, according to our view of the statute, had the indictment been against a step-father, or a parent, where the guilty participation of the other party to the act is not a necessary ingredient of the crime. But, as between step-mother and step-son, where the crime is joint, and where both must be guilty, or neither, we think it is fatally defective.

It follows, from what has already been said, that the court erred in sustaining the demurrer to the answer of the defendant, setting up the acquittal of Augusta Baumer, the step-mother, and other party to the alleged joint crime.

In addition to the above cited authorities, we may, on this point, refer to the following: *State v. Tom*, 2 Dev. 569; *The King v. The Inhabitants, etc.*, 18 East, 411; *Turpin v. The State*, 4 Blackf. 72.

In the last-named case, which was a prosecution for riot against three persons, upon the trial two were acquitted, and one found guilty. It

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was held, that upon this verdict no judgment could be pronounced against the defendant found guilty.

In the case of *Delany v. The People, supra*, it was held, that the parties must both be joined as defendants in the same information, but we do not care to lay this down as law.

Whether they be prosecuted in the same indictment or not, the crime must be charged as a joint crime. They may be tried separately, and one may be convicted and sentenced before the other is tried. If one be tried and acquitted, the other must be discharged; and it is said, in the Michigan case, that if one be tried, convicted, and sentenced, and the other tried and acquitted, this will, *ipso facto*, render the first conviction void.

The judgment is reversed, and cause remanded, with instructions to quash the indictment, and discharge the defendant.

Ordered accordingly.

BUSH, appellant, v. BROWN.

(49 Ind. 573.)

Duress — threat of imprisonment.

Plaintiff induced defendant who was in ill health to go into a secluded place where he was charged with an offense of which he was not guilty and persuaded that a person who was with and assisted plaintiff was a police officer having power to arrest. In consequence of a threat of immediate arrest and imprisonment defendant executed certain promissory notes. *Held*, such duress as would render the notes voidable.*

ACTION upon promissory notes. The complaint consisted of four paragraphs. The first was on a promissory note for four hundred dollars. The second was on a promissory note for twenty-five hundred dollars. The third alleged that, on, etc., there existed a real matter of difference between the plaintiff and defendant, which formed a proper subject of an action in favor of the plaintiff against the defendant, arising out of an alleged tort committed by the defendant against the plaintiff and his family; that the plaintiff was about to commence a suit against the defendant for damages, etc.; that the defendant, learning the intention of the plaintiff, etc., to compromise and settle said matter, etc., agreed to pay the plaintiff three thousand dollars, if the plaintiff would not bring such action; that the plaintiff accepted said proposition. The plaintiff then alleges performances of the agreement on his part and a failure on

* See *Harmon v. Harmon*, 14 Am. Rep. 556.

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the part of the defendant, demanding judgment in the sum of four thousand dollars. The fourth paragraph of the complaint was not materially different from the third.

The defendant answered as follows :

1. To the first and second paragraphs of the complaint, " that the notes were executed without any legal, valid or valuable consideration whatever, and that there never has existed and there does not now exist any such consideration for said notes."

2. For further answer to the same paragraphs of the complaint, that the notes were obtained from the defendant by fraud, deceit, threats, duress, and restraint, in this, to wit, that on the 24th day of September, 1870, the defendant, being in a very feeble condition, both physically and mentally, having then but partially recovered from a very severe attack of illness whereby he had been greatly prostrated, went to Jamestown, in, etc. ; that while there, he was approached by the plaintiff, and by him induced to go with him to a retired and secluded place, pretending to have business of great importance to transact with the defendant, and so soon as, by these pretenses, said plaintiff had induced the defendant to go into said retired place, the plaintiff then and there charged the defendant with having committed and performed an abortion upon the person of the plaintiff's wife, and represented and induced defendant to believe, and he did then believe, that one Samuel F. Wesner, who was then and there present, was an officer, then having full power to arrest and imprison said defendant. said Wesner at the time aiding and assisting in said representation ; and plaintiff then threatened the defendant with immediate arrest and imprisonment, unless said defendant would then and there execute to said plaintiff the said notes, and give to the plaintiff the sum of one hundred dollars in addition thereto, and said he would take said money and notes by way of compromise and in full satisfaction for said alleged crime ; and the defendant says he had never committed any such act or crime as that with which the plaintiff then charged him, but being in a very weak and feeble condition, as before stated, and being by said plaintiff put in great fear of bodily harm at the hands of said plaintiff, he signed said notes under said threats, and at the same time told said plaintiff that he had no hundred dollars to pay him ; and defendant says that the plaintiff wickedly and fraudulently, by conniving and conspiring with one John Couch, the plaintiff's brother-in law, to cheat and defraud the defendant, caused said Couch to then and there approach the defendant and offer to loan him the one hundred dollars demanded by the plaintiff, and to urge him to take the same and to accede to and comply with the demands of the plaintiff ; and the defendant says that being

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so restrained and harassed, and put in fear by said plaintiff and said Couch so conspiring as aforesaid to cheat and defraud the defendant, he did, influenced by said restraint and fear of bodily harm, accept the loan of said one hundred dollars as aforesaid, which he paid to said plaintiff, and, influenced, restrained, and fearing as aforesaid, he did at the same time execute said notes, though protesting at the time against the harsh and wrongful measures used against him; wherefore the defendant says said notes are without any legal or valid consideration whatever. Prayer for judgment for the one hundred dollars, with interest, etc.

3. For the answer to the third and fourth paragraphs of the complaint, the defendant pleaded a general denial; and for a fourth paragraph he pleaded matters amounting to a denial of any consideration for the promises alleged in those paragraphs.

The plaintiff demurred to the first, second, and fourth paragraphs of the answer separately, and the demurrers were all overruled. Reply by a general denial. Trial by a jury, and verdict for the defendant.

A motion for a new trial was made by the plaintiff, and overruled by the court. Final judgment for the defendant.

The errors assigned question the correctness of the rulings of the Circuit Court in overruling the demurrers to the first, second, and fourth paragraphs of the answer, and in refusing to grant a new trial.

J. McCabe, for appellant.

J. E. McDonald and *J. M. Butler*, for appellee.

DOWNNEY J. The defense of duress is of less frequent occurrence now than formerly, and hence not many cases have been decided by this court involving the question. To give validity to a contract, the law requires the free assent of the party who is to become chargeable thereon; and it therefore avoids any promise extorted from him by terror or violence, whether on the part of the person to whom the promise or obligation is made, or on that of his agent. Contracts made under such circumstances are said to be made under duress. 1 Chitty on Cont. 269, (11th Am. ed.)

Duress is of two kinds — duress of imprisonment, where a man actually loses his liberty; and duress *per minas*, where the hardship is only threatened and impending. 1 Bl. Com. 131. Either kind of duress, while it does not render the contract absolutely void, will yet enable the party so under duress to avoid it at his option. The party practicing the duress cannot take advantage of it. The imprisonment may be in a common prison, or it may be elsewhere. It appears to have been the

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rule that the imprisonment must have been unlawful, or, if lawful, undue force must have been used, or the party made to endure unnecessary privation, such as want of food, or the like, and he must have entered into a contract to obtain his liberty or to avoid such illegal hardship or privation. The mere fact of imprisonment was not deemed sufficient to avoid an agreement obtained through the medium thereof, if the party was in proper custody under the regular process of a court of competent jurisdiction.

Mr. Chitty expresses the opinion that it would be considered that an agreement made while the party was in confinement, in a civil action, regular in form, upon an arrest for a debt, without probable cause, would not be void on the ground of duress. The rule has not been laid down in the American cases quite so strongly against the defense. The following rules would seem to be supported by the authorities:

1. Where there is an arrest for improper purposes, upon valid process.

2. Where there is an arrest for a just cause, but without lawful authority; or,

3. Where there is an arrest for a just cause, and under lawful authority, for an improper purpose, and the party executes an instrument or pays money to free himself from the arrest, he may avoid the instrument or recover back the money paid. *Meadows v. Smith*, 7 Ired. Eq. 7; *Watkins v. Baird*, 6 Mass. 506; *Richardson v. Duncan*, 3 N. H. 508; *Nelson v. Suddarth*, 1 Hen. & Munf. 350; *Severance v. Kimball*, 8 N. H. 386; *Fisher v. Shattuck*, 17 Pick. 252; *Foss v. Hildreth*, 10 Allen, 76; *Hackett v. King*, 6 id. 58; *Brooks v. Berryhill*, 20 Ind. 97, and cases cited.

If a person, under a legal arrest, make an agreement to pay a debt, he cannot avoid it on the ground of duress. *Shephard v. Watrous*, 3 Caines, 166; *Crowell v. Gleason*, 1 Fairf. 325; *Meek v. Atkinson*, 1 Bailey, 84; *Bowker v. Lowell*, 49 Me. 429.

If a party execute an instrument from a well-grounded fear of illegal imprisonment, he may avoid it on the ground of duress. *Alexander v. Pierce*, 10 N. H. 494; *Worcester v. Eaton*, 13 Mass. 371; *Whitefield v. Longfellow*, 13 Me. 146; *Eddy v. Herrin*, 17 id. 338; *Foss v. Hildreth*, *supra*; *Foshay v. Ferguson*, 5 Hill (N. Y.), 154; *The Town of Princeton v. Vierling*, 40 Ind. 340; *Bennett v. Ford*, 47 id. 264; *The Town of Ligonier v. Ackerman*, 46 id. 552; S. C., 15 Am. Rep. 323.

Under these rules, the answer in question would seem not to be liable to the first objection urged against it.

It is alleged that the defendant had not been guilty of any such act or

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crime, and consequently had the officer been in possession of a writ for his arrest, at the instance of the plaintiff, and had the arrest been made, it would have been illegal within the rules above laid down. For the plaintiff to have caused the arrest of the defendant, when he was innocent of the charge made against him, would, as between them, have been in this sense an illegal arrest, although the officer might have had a writ which, in form, authorized the arrest.

[Matters of no importance are here considered.]

The judgment is affirmed, with costs.

Judgment affirmed.

JAUCH, appellant, v. JAUCH.

(50 Ind. 135.)

Slander — words spoken under influence of passion.

The fact that slanderous words were spoken in the heat of passion which was provoked by the one concerning whom they were spoken, may be shown in mitigation of damages

ACTION of slander, brought by appellee against appellants, for words uttered by appellant Mary Jauch, wife of Joseph, of and concerning appellee, in German, which are translated thus: "You are a God damned whore."

Appellants filed an answer in two paragraphs; first, a general denial; second, a plea in mitigation, averring substantially that appellee had wrongful possession of appellants' adopted daughter; that appellant Mary went to take said child, and while at appellee's house she (Mary) was cruelly assaulted and beaten by appellee with an iron poker, and the slanderous words (if spoken at all) were spoken while said Mary was in a state of excitement, etc.

Issue, trial by a jury, resulting in a verdict of two hundred dollars in favor of appellee, and, overruling a motion for a new trial, judgment on the verdict. The error assigned is overruling the motion for a new trial.

P. Maier, C. Denby, and D. B. Kumler, for appellants.

J. S. Buchanan, H. C. Gooding, and C. Buchanan, for appellee.

BUSKIRK, C. J. The first error complained of is the exclusion of com-

petent evidence. To comprehend the nature and relevancy of the evidence excluded, we will have to state the substance of the evidence.

The deposition of John Stauch was read. He testified that he heard Minnie call Mary "a God damned whore;" he saw Mary strike Minnie in the breast; saw Minnie have a strip of iron one foot long, the eighth of an inch thick, and three-fourths of an inch wide in her hand, but did not see her strike Mary with it. Minnie Jauch testified, in substance, that she had raised the girl, and had letters of guardianship for her; that Mary came on Sunday to her house, where the little girl had come that day; that Mary asked for the girl, and witness said she might take her home in the evening; that Mary then struck witness, took the child, went out on the pavement, and there called her, in German, "a d——d bitch;" witness had a piece of iron in her hand, but does not know whether she used it; Mary knocked her on the table.

John Dugan testifies substantially as follows: "Mary Jauch came into the saloon of Minnie Jauch; gave Minnie a shove; then went out, and on the outside said: 'You are a God damned whore;' I saw a piece of poker there; there was much excitement." Plaintiff then proved the translation into English of the German words laid in the declaration.

Appellants then introduced their witnesses in the following order: Mrs. Mary Jauch testified, that she went to Minnie's house with a policeman; demanded the girl; Minnie said she could not have her; little girl came and gave witness her hand; then Minnie struck witness five or six times with a poker, injuring her considerably; two men put her out of doors; she did not utter the words charged; did not strike Minnie. Julius Knoll testified: "I went with Mary Jauch to get the child; Minnie stood in Mary's way, but she crowded into the dining-room; I did not go in; heard a scuffle; went in; saw Minnie hammering away at Mrs. Mary with a poker." Theresa Lieberman: "I went there with Mrs. Mary Jauch; Mary said she wanted little girl; Minnie said she couldn't get her; Mary struck nobody; Minnie struck Aunt Mary on the head with a poker five or six times; Aunt said nothing on the pavement." Dr. Schultz described injuries on the head of Mrs. Jauch. Hirschberger: "Was there with Dugan; he swears that he went out of the bar-room after Dugan went out; did not hear Mrs. Jauch call any name."

The appellants offered to prove by the said Hirschberger that he was present in the dining-room, and saw Minnie attack the defendant Mary with a poker, and that Minnie made the first attack, and struck the defendant Mary several times with a poker; but the court refused to per-

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mit witness to testify to any thing that took place in the dining-room. The defendants excepted to this ruling. The defendants rested.

In rebuttal, the appellee introduced one Eilenstein, who testified in substance, that Mary Jauch slapped Minnie on the breast, and that she called her a dirty sow.

Counsel for appellants, after reviewing the evidence offered by plaintiff, make the following argument in favor of the competency and importance of the evidence excluded.

“ For the defendant below, Julius Knoll and Theresa Lieberman had seen the blows ; but Knoll was a policeman, and Theresa a niece of the appellants. Their testimony was to be weighed by the jury. In order to corroborate them and Mrs. Mary Jauch, appellants offered to prove by a disinterested eye-witness the facts as they occurred. There is no discretion in the court to exclude evidence on a material point, at least until three witnesses have given their testimony touching it. Mrs. Mary Jauch cannot stand here in the attitude of a witness simply, because she is a party. She had the undoubted right to introduce and examine three witnesses in her defense ; and the court, admitting the materiality, excludes the witness simply on the ground that ‘ it had all been testified about. ’ It is impossible not to see that great injustice was done the appellants, as well by the exclusion of the evidence offered as by the manner in which it was done. The court fairly instructed the jury as to the effect of mitigating circumstances. The charge shows how material it was to prove these circumstances.”

Counsel for appellee argue as follows, in reference to the exclusion of the testimony of Hirschberger :

“ There is no doubt but that the court has the right to arrest the examination of witness, if unnecessary time is being taken, or the evidence offered is immaterial or incompetent. *Rosser v. McColly*, 9 Ind. 587. It is not only the right but the duty of the court to do this. But this discretionary power of the court must be so exercised that no injustice will result therefrom.

“ This was an action for slander, and not for an assault and battery. The evidence of the witness Hirschberger, sought to be introduced, was all in reference to a fight and quarrel between the parties, and could have been competent only to mitigate the damages, but for no other purpose. The court refused to allow him to testify, not because his evidence was not competent to mitigate, but simply because the fact had already been fully testified about, and was not disputed by any witness, or questioned before the jury.

“ The instructions of the court to the jury were certainly as full and

liberal in favor of appellants as could be desired; and the refusal of the court to allow appellants to continue the examination of Hirschberger as to a fact which had already been fully proven, and which was not even disputed, could not have prejudiced appellants, because the court instructed the jury to take into consideration the quarrel and fight, in mitigation of damages.

“The court excluded this proof, stating that it had all been testified about already, and that the fact that the plaintiff struck defendant first with a poker was only material in this case as showing the anger and excitement of the defendant at the time the words were charged to have been spoken.”

In *Rosser v. McColly*, 9 Ind. 587, it was said: “Where, in the progress of a trial, it becomes obvious that a party, in the examination of his witnesses, or in the argument of his case, is consuming time unnecessarily, and not in the advancement of justice, it is clearly within the discretionary power of the court to interpose and arrest such needless operations. And the exercise of this power will be sustained, unless an abuse of it is affirmatively shown. *Priddy v. Dodd*, 4 Ind. 84. Here, the court ordered the plaintiff to close his rebutting testimony. It is not, however, shown that he had other evidence which he desired to produce. The order does not, therefore, appear to have prejudiced his case. It was competent for the plaintiff to have placed on the record the grounds of his objection to the action of the court. And having failed to do so, we must intend the rulings of the court to be correct.”

In *Priddy v. Dodd*, *supra*, it was said: “In the consumption of time in examining witnesses and arguing causes to the jury, much must necessarily be left to the discretion of the judge. It is peculiarly within the province of judicial discretion to see that these operations are not needlessly protracted, to the delay and detriment of other business on the docket.”

The defendant may set up, in mitigation of damages, that he spoke the words in a moment of heat and passion, induced by the immediately preceding acts of the plaintiff. *Townshend on Slander & Libel*, 626 § 414.

In *McClintock v. Crick*, 4 Iowa, 453, the following language was used: “If, however, the words were spoken through heat of passion, or under excitement, produced by the immediate provocation of plaintiff, such excitement or passion may be shown in mitigation of damages; ‘for evidence that the speaking was impulsive and involuntary, undoubtedly diminishes malice, as understood by the law.’ *Larned v. Buffinton*, 8 Mass. 546; *Iseley v. Lovejoy*, 8 Blackf. 462. And it may be stated as

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a general principle, that all the immediate circumstances, under which the words were spoken, are proper to be shown to the jury, as they define the true character of the speaking, which is alleged to be slanderous. See note to *Gilman v. Lowell*, 1 Am. L. Cas. 223." See, also, *Brown v. Brooks*, 3 Ind. 518; *Mousler v. Harding*, 38 id. 176; *Powers v. Presgroves*, 38 Miss. 227; *Ranger v. Goodrich*, 17 Wis. 78; *Richardson v. Northrup*, 56 Barb. 105. .

Hirschberger was the only witness, except the two women, who knew all the facts that occurred in the dining-room. Hence, all the immediate circumstances under which the words were spoken were not before the jury. It is not enough that the words were spoken in heat of passion or excitement. It must also appear that there was provocation caused by the person of whom the words were spoken, which immediately preceded the speaking of the words. A person cannot, without just cause or provocation, work himself or herself into a passion, and while laboring under the excitement produced by such passion, utter slanderous words, and then mitigate the damages by proof that the words were uttered in a heat of passion. There was a conflict in the evidence as to which struck the first blow. It was proposed to prove by Hirschberger that the appellee attacked Mary with a poker and struck her several times with it. If this were true, Mary had sufficient cause for passion and excitement, which should have been considered in mitigation: for the provocation immediately preceded the speaking of the words, and was caused by the acts of the appellee.

We think the court erred in the exclusion of such evidence.

The judgment is reversed, with costs; and the cause is remanded, with directions for a new trial in accordance with this opinion.

Ordered accordingly.

PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY, appellant, v. NUZUM.

(50 Ind. 141.)

Passenger — duty of railway.

It is the duty of a passenger upon a railway to inform himself beforehand of the regulations of the company for running its trains, and the fact that a ticket for a certain station is sold to him by the company without notice, and that he is permitted to enter the first train leaving thereafter, does not entitle him to require that the train be stopped at such station if it is not in accordance with the regulations for running trains

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ACTION for damages for breach of contract. The complaint alleged that the appellant was the owner of a railroad line, running from Columbus, Ohio, with its cars and locomotives, to Chicago, Illinois, by the way of Union City, Marion, Sweetser, Xenia, and Logansport, over and upon which the appellant, as a common carrier, carried passengers and baggage; that the appellee purchased a ticket for a first-class passage in said cars, along said railroad, from Union City to Sweetser, on the night passenger train; that he was received into said cars on said train, to be so carried; that the appellant, though requested to do so, refused to stop the train at Sweetser and allow the appellee to get off the car, although the conductor took up said ticket for said passage; that in consequence of such refusal the appellee was carried on westward to Xenia, the next station west of Sweetser, where he was landed between midnight and day-light, and was compelled to go to a hotel to lodge, and remain until eight o'clock next day before he could return to Sweetser; that he was thus put to much expense, delay, etc.; wherefore, etc.; all of which is properly alleged.

The complaint was answered by three paragraphs. Issues were formed on the first and second paragraphs of answer. The third paragraph, admitting that the appellant was a carrier over the road, as alleged, the purchase of the ticket, etc., averred that she ran two daily trains from Union City to Sweetser, which trains always stopped at Sweetser, and also ran a through train from Columbus, Ohio, to Chicago, Illinois, which, by the rules and regulations governing said railroad, was not allowed to stop at Sweetser; that when said ticket was taken up the appellee was informed by the conductor that the train he was on was not allowed to stop at Sweetser; that he, the appellee, would have to get off at Marion, the first station east of Sweetser, or go on to Xenia, the next station west of Sweetser; that the appellee voluntarily passed on to Xenia, and got off at that station; with some other averments not material to the question raised.

To this paragraph the appellee replied, that he purchased the ticket expressly for the train on which he took passage; that it was the first train which ran to Sweetser after he purchased his ticket; that he had no knowledge that the train would not stop at Sweetser, but, on the contrary, avers that he was informed by said appellant, at the time he so purchased said ticket, that said train would stop at said station of Sweetser, and allow him to leave the same, etc.

To this paragraph of reply, the appellant demurred for want of alleged facts. The demurrer was overruled by the court below, exception taken, and error assigned in this court.

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N. O. Ross, for appellant.

J. Brownlee and *R. W. Baily*, for appellee.

BIDDLE, J. We do not think the court erred in this. If the appellee expressly purchased the ticket for that train; and at the time was informed by the appellant that the train would stop at the station Sweetser, he had a right to take passage on it, and it became the duty of the appellant to allow him to leave the train at that place.

A trial by jury was had, verdict for appellee, motion for a new trial overruled, exception, and appeal.

The evidence, instructions refused, and instructions given, exceptions taken, and errors assigned, are all properly before us.

At the request of the appellee, the court instructed the jury as follows: "If the jury find that plaintiff purchased a ticket for Sweetser, and the train in which he entered was the first train that was due after the purchase, he had a right to enter on that train, unless he was informed that that train would not stop at Sweetser, before he entered the train."

There was evidence tending to prove the facts alleged in the third paragraph of answer. In view of this, we think the instruction was wrong. It amounted to saying to the jury, that notwithstanding the appellant ran two daily trains which stopped at Sweetser, yet, if the train upon which the appellant took passage was the first one due at Union City after he purchased his ticket, the appellant was bound to have it stopped at Sweetser to allow the appellee to get off, although by the regulations of the appellant that train was not allowed to stop at that station. Under such circumstances, the appellant was not bound to stop her train at Sweetser. It was the duty of the appellant to the public to run her trains according to her regulations. These could not be infringed to accommodate a single passenger. It was the duty of the appellee to inform himself when, where, and how he could go, or stop, according to the regulations of the appellant's trains, and if he made a mistake, which was not induced by the appellant, he has no remedy. *Cheney v. The Boston & Maine R. R. Co.*, 11 Metc. 121; *Boston & Lowell R. R. Co. v. Proctor*, 1 Allen, 267; *Johnson v. The Concord R. R. Co.*, 46 N. H. 213; *The Cleveland, etc., R. R. Co. v. Bartram*, 11 Ohio St. 457.

A railroad company is not bound to stop and allow a passenger to get off, except at a regular station or stopping place. *The Columbus, etc., R. W. Co. v. Powell*, 40 Ind. 37.

The appellant moved the court to instruct the jury as follows: "If the jury find that at the time the plaintiff entered the car of the defend-

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ant to be conveyed from Union City to the station Sweetser, and at the time he purchased of the defendant a ticket entitling him to such conveyance, said station of Sweetser was not a regular stopping place for said train, and had not been for more than one month before that time, and you further find that the defendant had one or more other daily trains passing over said road that did stop regularly at Sweetser, then it was the plaintiff's own misfortune that he got upon the wrong train, and he cannot recover." This instruction was refused.

We think this instruction states the law that governs the case, even tenderly expressed toward the appellee; and as there was evidence before the jury to which it was applicable, it was error to refuse it. See authorities cited, *supra*.

There is a point raised in the record upon the admission of certain evidence, which is not clear to us; and as it may not arise in another trial, we leave it an open question.

The judgment is reversed; cause remanded, with instructions to grant the motion for a new trial, and for further proceedings according to this opinion.

Ordered accordingly.

RIDGWAY, appellant, v. INGRAM.

(50 Ind. 145.)

Statute of frauds — sufficiency of memorandum of sale.

A sheriff, who sold property under a judgment of foreclosure, indorsed on the order of sale this: "Sold to Asa J. Ridgway for twenty-four hundred dollars, October 16, 1869. J. D. Phelps, Sheriff L. C." *Held*, not sufficient to identify the property under the statute of frauds.

ACTION to recover money in foreclosure proceedings. Harvey Truesdell recovered judgment for the foreclosure of a mortgage on a forty-acre tract of land, described in the proceedings herein, for a little over one thousand dollars, against one Thomas W. Miles. This judgment was assigned to the appellee, Sarah Ingram. The appellee also obtained a judgment against Miles for the foreclosure of another mortgage on the same and other lands, for a much larger sum. Orders of sale were issued on these judgments respectively.

We do not see that the judgment secondly above mentioned, or the

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order of sale issued thereon, has any important bearing upon the question involved, and they will, therefore, be no further noticed.

On the order of sale issued on the first-mentioned judgment, the sheriff indorsed the following memorandum, viz. :

“Sold to Asa J. Ridgway, for twenty-four hundred dollars. October 16th, 1869.

“ J D. PHELPS, *Sheriff L. C.*

“ By WM. H. H. WHITEHEAD, *Dep’y.*”

The above memorandum is all the evidence there was, except such as was oral, that Ridgway purchased the land at sheriff's sale.

This proceeding was instituted by the appellee against the appellant, under the provisions of § 476, 2 G. & H. 252, for failing and refusing to pay the purchase-money claimed to have been bid on the property by the appellant. Judgment for the plaintiff below.

J. B. Niles, W. Niles, and W. H. Calkins, for appellant.

J. Bradley, for appellee.

WORDEN, J. The question is presented by the record, in several ways, whether the above memorandum is a sufficient contract, memorandum or note thereof, within the statute of frauds. It appears to us that the memorandum is clearly insufficient. A memorandum, in order to be sufficient within the statute, must state the contract with such reasonable certainty that its terms may be understood from the writing itself, without recourse to parol proof. It is impossible to ascertain from the memorandum what it was that was “sold to Asa J. Ridgway for twenty-four hundred dollars.”

It may be supposed, from the fact that the memorandum was indorsed on the order of sale, that the sheriff meant that the land therein ordered to be sold was sold to Ridgway for the sum named. But this would rest upon mere inference, and not upon any thing appearing on the face of the memorandum. It may be conceded, that if the memorandum had in any way referred to the order of sale for the purpose of identifying the thing sold, so as to make it a part of the memorandum, or so that the two papers, the order of sale and the memorandum, could be taken together as constituting the contract, it would have been sufficient.

The memorandum indorsed upon the order of sale, but without any reference to it for the ascertainment of the thing sold, is no better than if it had been made on any other piece of paper.

Says Chancellor KENT. 2 Com. 511: “Unless the essential terms of

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the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not in compliance with the statute; and if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute of frauds and perjuries was intended to prevent." *Norris v. Blair*, 39 Ind. 90.

"It must, of course, appear from the memorandum, what is the subject-matter of the defendant's engagement. Land, for instance, which is purported to be bargained for, must be so described that it may be identified." Browne on Stat. of Frauds, § 385.

As we have seen, the memorandum does not state what it was that was sold to Ridgway. It does not name or in any way state the subject-matter of the supposed contract. If we are to suppose that the thing sold was the land mentioned in the order of sale, because the memorandum was indorsed upon that order, the supposition must rest upon mere inference and conjecture. It seems to be well settled, that a memorandum, in order to make another writing a part thereof, so as to constitute a part of the contract, must refer to such other writing; and that parol proof of the connection of the papers is not admissible to establish a contract required by the statute of frauds to be in writing. An early case on this subject is that of *Boydell v. Drummond*, 11 East, 142. There the defendant had subscribed his name to a book entitled, "Shakespeare subscribers, their signatures," not referring to a printed prospectus which contained the terms of the contract, and which was delivered at the time to the subscribers to the Boydell Shakespeare. It was held, that the two could not be connected together so as to take the case out of the statute, as such connection could only be established by parol proof.

Lord ELLENBOROUGH observed, in delivering his opinion: "If there had been a plain reference to the particular prospectus, that might have helped the plaintiff; but there is nothing of the kind."

Without going into the details of other cases, we quote a paragraph from the opinion in each of a few, involving the point under consideration:

In the case of *Ridgway v. Wharton*, 3 De G. M. & G. 677, 696, the Lord Chancellor said, in delivering the opinion of the court: "It appears to me, therefore, that the principle established by these cases, and as I have already observed, the principle deducible from the construction and object of the statute if there had been no cases, clearly shows, that in order to make a contract binding under the statute of frauds, it must be either embodied all in one paper, signed by the party; or if not so embodied, there must be some paper signed by the party referring to the paper which does contain the terms, in order that from the writing so signed

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you may say that is the paper, and incorporate them together and make it one."

The following point was decided in the case of *Freeport v. Bartol*, 3 Greenl 340: "Where an agreement concerning the sale of real estate is contained on two separate papers, neither of which contains in itself any reference to the other, parol evidence is inadmissible to prove their connection."

In *O'Donnell v. Leeman*, 43 Me. 158, 160, it was held to be "well settled that unless there be a memorandum showing, within itself, or by reference to some other paper, all the material conditions of the contract, no action can be maintained upon such contract, either at law or in equity."

In *Morton v. Dean*, 13 Metc. 385, 388, it was held by the court, that "a sale at auction is within the statute of frauds, and the auctioneer, who makes the sale, is the agent of both parties, and his memorandum will take the case out of the statute, as well when lands as when chattels are sold. But the memorandum of sale must refer to the conditions of sale, or the case will be within the statute. Where the connection between the memorandum and the conditions is to be proved entirely by parol evidence, it is within the mischief intended to be prevented by the statute. The terms of the agreement, which are material, must be stated in writing. As the memorandum, in this case, does not refer to the conditions of sale, the sale itself cannot be enforced. The authorities are conclusive on these points."

See, also, the case of *Ruckle v. Barbour*, 48 Ind. 274, which involved a question arising from the statute of frauds.

The judgment below is reversed, with costs, and the cause remanded for further proceedings.

Ordered accordingly.

GREER V. THE STATE.

(50 Ind. 267.)

Criminal Law — Variance — rape.

The statute of Indiana defines two classes of rape, one upon a woman against her will, the other upon a female child under twelve years of age. Held, that an indictment setting forth an offense of one class could not be sustained by proof of one of the other class.

INDICTMENT for rape against the appellant, charging that he, "on the 19th day of January, A. D. 1875, at the county of Marion, and State of Indiana, did then and there, in a rude, insolent, and angry manner, unlawfully touch and assault one Mary E. Clayes, a woman, with the intent then and there the said Mary E. Clayes, forcibly and against the will of said Mary E. Clayes, to ravish and carnally know, contrary," etc.

Motion to quash overruled, and exception.

Trial by jury, conviction, and judgment that defendant pay a fine of one hundred dollars, and be imprisoned for the term of two years in the State prison.

J. C. Pearson and J. S. Campbell, for appellant.

C. A. Buskirk, Attorney-General, for the State.

WORDEN, J. It appeared on the trial of the cause that the person charged to have been assaulted by the defendant was a female child, between eleven and twelve years of age at the time of the assault. The court gave, as applicable to the case, the following charge, to which the defendant excepted, viz. :

"You will observe that if a person has carnal knowledge of a woman child, under the age of twelve years, he is guilty of rape, whether the carnal knowledge was with or without the consent of the child; for the law presumes that a child under the age of twelve years is not capable of consenting to intercourse, so that a man having connection with her is guilty of rape, whether it was with her consent or not."

The jury must have understood from this charge that if the defendant perpetrated the assault and battery upon the child, she being under the age of twelve years, with intent to have carnal connection with her, he might be convicted of the offense charged, without regard to the question whether he intended to have such connection with or without her consent.

The charge may have been correct as an abstract proposition, but it was clearly wrong as applied to the charge contained in the indictment. The indictment charges that Mary E. Clayes, the person charged to have been assaulted, was a woman, and that the defendant intended to carnally know her forcibly and against her will. The statute defining and providing punishment for rape provides, that "every person who shall unlawfully have carnal knowledge of a woman against her will, or of a woman child under twelve years of age, shall be deemed guilty of rape," etc. 2 G. & H. 440, § 14. This statute, it will be seen, enumerates

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two classes of facts, each of which constitutes a rape. First, it is a rape to unlawfully have carnal knowledge of a woman against her will. We take it that all females of the human species over twelve years of age are to be deemed women within the meaning of the first clause of the statute. Second, it is a rape to unlawfully have carnal knowledge of a woman child under twelve years of age. In the second case, it is immaterial whether the child consent or not, for if she consent, the act constitutes a rape nevertheless. But the prosecutor cannot charge a rape of the one class, and sustain the charge by proof of a rape of the other class. Nor can he charge an assault and battery with intent to commit a rape of the one class, and sustain the charge by evidence of an intent to commit a rape of the other class. The variance between the allegations and the proof is fatal. This is established by the following, among other authorities that might be cited: 1 Whart. Crim. Law, § 611; 1 Bish. Crim. Prac., §§ 485, 886; *Turley v. The State*, 3 Humph. 323; *Hooker v. The State*, 4 Ohio, 348; *The State v. Noble*, 15 Me. 476; *State v. Jackson*, 30 id. 29; *Dick v. The State*, 30 Miss. 631.

There need be no trouble in cases of this kind, as, if there is any doubt about the age of the person assaulted or ravished, the offense can be charged both ways in different counts.

A motion for a new trial was properly made, and should have been sustained.

There are some other questions made in the cause, but as we suppose they will not be likely to again arise upon the trial of the defendant upon this indictment, we pass them over.

The judgment below is reversed, and the cause remanded for a new trial. The clerk will give the proper notice for the return of the prisoner.

Judgment reversed.

FLEMING, appellant, v. McDONALD.

(50 Ind. 278.)

Joint wrong-doers — judgment and execution against.

The injured party may sue several joint trespassers separately and prosecute each suit to final judgment. He cannot, however, have separate executions, but must elect, and the issue of an execution against one discharges the others.

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ACTION against the appellee and Peter Godfrey, for an assault and battery. The complaint contains two paragraphs. The first paragraph alleges, "that said defendants assaulted and beat the plaintiff, whereby," etc.

The second paragraph alleges the same thing, with aggravation, and special damages, whereby, etc.

The appellee pleaded several paragraphs of answer, all of which were withdrawn, but the third paragraph, which is as follows :

That in 1869, the appellant sued the appellee and Peter Godfrey, for the same trespass ; that at the February term of the court, 1870, he recovered a joint judgment against said appellant and Godfrey, on default, for twelve hundred dollars and costs ; that at the February term, 1871, on motion, the court set aside the default and judgment as to the appellant, "for the reason that this defendant (the appellant) did not have actual notice of said suit at the time default and judgment therein were taken against him, leaving said judgment so taken against Peter Godfrey in full force, unappealed from, and unreversed ;" that afterward the appellant sued out execution in due form of law, and placed the same in the hands of the sheriff of Crawford county ; that said sheriff levied the same on the property of said Peter Godfrey, and sold the same in due form of law, etc. ; all of which is more particularly averred as to time, place, etc. ; wherefore, etc.

The appellant demurred to this paragraph of answer, for want of sufficient facts ; the court overruled the demurrer, and, the appellant refusing to reply, rendered judgment in favor of the appellee for his costs. Exceptions and appeal were properly taken. The error assigned is overruling the demurrer to the third paragraph of answer, which raises the only question in the case. The appellee files no brief, and the appellant cites no authorities.

F. Wilson, M. F. Dunn, and J. W. Tucker, for appellant.

BIDDLE, J. In England, such a plea as the third paragraph of the answer in this case, even without averring the issue of an execution on the judgment, would be held good. In *Brinsmead v. Harrison*, L. R., 7 C. P. 547, a late English case, it was held that a judgment against A. for the joint tort of A. and B. is a bar to another action against B. for the same act.

KELLY, C. B., remarks: "If it were held not to be a defense, the effect would in the first place be to encourage any number of vexatious actions, wherever there happened to be several joint wrong-doers. An

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unprincipled attorney might be found willing enough to bring an action against each and every of them. * * Judgment having been recovered against one or more of the wrong-doers, and damages assessed, if that judgment afforded no defense, the plaintiff might proceed to trial against another of them, and the second jury might assess a different amount of damages. Which amount is the plaintiff to levy? * * There is no authority whatever — since the reigns of the Henrys and the Edwards nothing approaching to an authority has been cited — to show that such a plea as this would not be a good defense.”

In America, the decisions upon this question have not been uniform. In some of the States, it has been held that it requires a satisfaction of a judgment against one joint tort-feasor before it can be pleaded in bar by a co-tort-feasor in another action for the same wrong; others hold that taking execution is sufficient, without averring satisfaction. Perhaps some have gone to the extent of the English rule.

In our opinion, the true doctrine was announced in *Allen v. Wheatley*, 8 Blackf. 332: “The injured party, if he choose, may sue several joint trespassers separately, and prosecute each suit to a final judgment, but there he must stop and elect against whom he will take his execution. * * He cannot have two separate executions. Hence a final judgment and an execution, or an order for an execution, against one of several joint trespassers, is a discharge of all the others.”

And we believe this to be the current of American authors. *Davis v. Scott*, 1 Blackf. 169; *Fitzgerald v. Smith*, 1 Ind. 310; *Prichard v. Campbell*, 5 id. 494; *Snodgrass v. Hunt*, 15 id. 274; *Golding v. Hall*, 9 Porter, 169; *Blann v. Crocheron*, 20 Ala. 320; *Smith v. Singleton*, 2 McMullan, 184.

We are of opinion that the ruling of the court below was right.

The judgment is affirmed.

Judgment affirmed.

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appellant, v. HECK.

(50 Ind. 303.)

Title — to personal property contracted to be sold — damages — measure of.

Plaintiff agreed to sell and defendant to purchase a quantity of wood which plaintiff was to draw and pile in a certain place where defendant was to measure, receive and pay for it at a specific price per cord. The wood was drawn and piled and defendant had measured and received part, but refused to measure and receive the remainder

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The wood was burned. *Held*, that the title of the unmeasured wood was in plaintiff, and he was entitled to recover from defendant not the contract price thereof but the difference between the contract price and the market price at the time and place it should have been accepted.

ACTION by the appellee against the appellant, upon contract. The complaint was in two paragraphs, not materially unlike. It alleged, in substance, that an agreement was entered into between the plaintiff and the defendant, by which the plaintiff was to furnish, cut, haul, and pile along the line of the defendant's railroad a quantity of firewood, which the defendant was to measure, receive and pay the plaintiff for, at a specified rate per cord; that, in pursuance of the contract, the plaintiff did furnish, cut, haul, and pile along the line of the defendant's road a large quantity of firewood as stipulated for, of which the defendant had notice; that the defendant measured, received and paid for some portions of the wood, but as to other portions thereof, viz., seven thousand six hundred and sixty-seven cords thereof, the defendant refused to measure, receive and pay for the same according to the agreement, though the plaintiff often requested the defendant to measure, receive and pay therefor; that while the defendant thus failed and refused to measure, receive and pay for the last-mentioned wood, a large part thereof, viz., thirty-one hundred and fifty-three cords thereof, were, on, etc., without the fault or negligence of the plaintiff, destroyed by fire, to the damage of the plaintiff, etc.

Issues were made up, and the cause was tried by a jury, resulting in a verdict and judgment for the plaintiff for seven thousand four hundred dollars.

N. O. Ross, for appellant.

O. B. Sausum, for appellee.

WORDEN, J. The main question in the cause arises upon the refusal of the court to give the following charge asked by the defendant, viz. :

"Under the contract sued on in the first and second paragraphs in the complaint, the wood by the plaintiff cut, hauled, and piled up along the line of the defendant's railroad was not the property of the defendant until measured and received by the defendant, and if you find that it was destroyed by fire before it was received, the loss was the plaintiff's and not the defendant's."

There are no facts averred in the complaint that made the wood the property of the defendant at the time it was burnt. Nor does it appear

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'n evidence that the plaintiff, at any time before it was burnt, did any thing showing that he regarded the wood as the property of the defendant, or at her risk. On the contrary, he insured it as his own after it should have been received by the defendant in accordance with the alleged contract. The cause was tried, and the verdict evidently found, upon the theory that the measure of damages was the contract price of the wood. If this was legally correct, the charge ought not to have been given, because the loss in such case would be the loss of the defendant and not the plaintiff. But if the true measure of damages in such case is the difference between the contract price and the market value of the wood at the time and place when and where it should have been accepted by the defendant, the charge should have been given, because, in such case, the loss would be that of the plaintiff. Mr. Chitty lays down the rule in the following terms :

“In an action for not accepting goods, the measure of damages is the difference between the contract price and the market price, on the day when the vendee ought to have accepted the goods.” Chitty on Cont. 133. (11th Am. ed.).

This rule is sustained by a large number of cases, among which are the following: *Williams v. Jones*, 1 Bush, 621; *Haskell v. McHenry*, 4 Cal. 411; *Allen v. Jarvis*, 20 Conn. 38; *Northrup v. Cook*, 39 Mo. 208; *Gatling v. Newell*, 12 Ind. 118, 125; *Beard v. Sloan*, 38 id. 128; *Ganson v. Madigan*, 13 Wis. 67; *Gordon v. Norris*, 49 N. H. 376.

In the case last cited, the distinction is pointed out between contracts for the sale of goods then in existence, and agreements to furnish materials and manufactured articles in a particular way and according to order, in respect to the statute of frauds and otherwise. The rule of damages is the same in contracts for the sale of real estate. *Old Colony Railroad Corporation v. Evans*, 6 Gray, 25; *Griswold v. Sabin*, 51 N. H. 167; *Porter v. Travis*, 40 Ind. 556.

It is conceived that in all cases of contracts for the sale of personal property, where it has any market value, the vendor, before he can recover of the vendee the contract price, must have delivered the property to the vendee, or have done such acts as vested the title in the vendee, or would have vested the title in him, if he had consented to accept it; for the law will not tolerate the palpable injustice of permitting the vendor to hold the property and also to recover the price of it.

In the case of *Bement v. Smith*, 15 Wend. 493, which has been cited by counsel for the appellee, the defendant had employed the plaintiff to make a sulky. The plaintiff made the sulky and took it to the residence

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of the defendant, and told him that he delivered it to him and demanded payment in pursuance of the terms of the contract. The defendant denied having agreed to receive it. The plaintiff told him that he would leave the sulky with a person in the neighborhood, naming him, which he did, and commenced suit. It was held that the plaintiff had performed his part of the contract, and was entitled to recover the contract price for the sulky. The case went upon the theory that there had been a delivery of the property to the defendant, as is shown in the case of *Gordon v. Norris, supra*.

So, in the case of *Ballentine v. Robinson*, 46 Penn. St. 177, the plaintiff agreed to build an engine according to directions of defendant, and furnish the necessary materials for it. The plaintiff was held to be entitled to the contract price, the court holding that, upon the facts shown, the title to the property had vested in the defendant.

In the case of *Girard v. Taggart*, 5 S. & R. 19, 33, GIBSON, J., in delivering his opinion, said :

“The damages recovered are not the price of the goods sold, but a compensation for the disaffirmance of the contract; and the difference on the resale is merely the measure of the damages actually suffered. Properly speaking, the seller cannot recover the price, where he has retained the goods in consequence of the buyer's refusal to comply with any part of the contract,” etc.

In *Ganson v. Madigan, supra*, the court held, that “where the vendor has actually taken all the steps necessary to vest the title to the goods sold in the vendee, he may sue for goods sold and delivered, and the rule of damages would be the contract price. But where he is ready and willing to perform, and offers to do so, but the vendee refuses, even though the title is not vested in the vendee, the vendor still has his action on the contract for damages. But the rule of damages in such case would be the actual injury sustained, which is ordinarily the difference between the value of the property at the time of the refusal and the price agreed on.”

As the property had not passed from the vendor, the plaintiff, at the time it was destroyed, he must bear the loss. The destruction of the property was not caused by, nor was it the consequence of, the breach by the defendant of her contract. The case of *McConihe v. The New York and Erie R. R. Co.*, 20 N. Y. 495, is in every way in point here. There, one Mallory, who had assigned his claim to the plaintiff, had agreed with the defendant to furnish materials and build certain cars for the defendant, and the defendant was to furnish the iron boxes therefor. Mallory set up some of the cars and had the work ready to set up the others, and

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those set up were completed as far as it was possible without the boxes, which the company neglected to furnish. He expended over two thousand dollars in the work and materials, and was prevented from completing the contract by the failure of the defendant to furnish the boxes, as she had agreed, though Mallory frequently urged her to furnish them. While matters were in this condition, all the cars and materials, except the iron, were consumed by fire, without any carelessness on the part of Mallory. The court said :

“ Mallory agreed to build for the defendant fifteen lumber cars, from materials to be furnished by him, except the boxes which the defendant agreed to furnish, and the expense of which was to be deducted from the price of the cars. This was in effect an agreement for the sale of the cars, thereafter to be constructed by Mallory, to the defendant, and did not vest any property in the defendant until the cars were completed and delivered. *Andrews v. Durant*, 1 Kern. 35. In that case the authorities are cited and very ably reviewed, and it is unnecessary again to examine them upon this proposition. It then follows that the cars set up, and materials for those not set up, were the property of Mallory at the time of their destruction by the fire. The rule is that the party in whom the title to the property is vested must bear the loss in case of destruction by accident.”

In *Dustan v. McAndrews*, 44 N. Y. 72, 78, it is held, that “ the vendor of personal property in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself. 1. He may store or retain the property for the vendee, and sue him for the entire purchase-price. 2. He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale ; or, 3. He may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price.”

The latter is the method adopted by the plaintiff in this case. He kept the wood as his own. After it should have been received by the defendant, he insured it in his own name and for his own benefit, clearly evincing an election to regard it as his own, and not the property of the defendant. He must, therefore, accept the rule of damages applicable to such case.

The court below, in our opinion, erred in refusing to give the charge asked.

Our attention has been called to the case of *Chamberlain v. Farr*, 23 Vt. 265. There was a sale of some straw, a part of which only the pur-

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chaser took away, and the residue the vendor threw into his barnyard, and the next spring to his cattle, it having become damaged. It was held that the purchaser was liable for the price of the straw sold, less the value of that part not taken for the purpose to which it was applied. But the case is not at all in point here, because the court held that, under the facts shown, the title to the whole of the straw vested in the purchaser.

The case of *Martineau v. Kitching*, L. R., 7 Q. B. 436, is not in point on the question we have been considering. There, the plaintiff had sold to the defendant certain sugars, a part of which had not been taken away, when they were destroyed by fire. It was held that the loss fell upon the purchaser. A part of the court held this, upon the ground that upon the facts the title to the sugars had vested in the purchaser, and the residue of the court, upon the ground that by the terms of the contract the undelivered sugars were to be at the risk of the purchaser.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

Ordered accordingly.

SUMNER, appellant, v. BEELER.

(50 Ind. 341.)

Unconstitutional enactment — liability for acts done under.

Ministerial officers and other persons are liable for acts done by them under a legislative enactment which is unconstitutional.

ACTION to recover damages for an illegal arrest. The opinion states the case.

Hadley & Ogden, and Ritter, Walker & Ritter, for appellants.

C. C. Nave, for appellee.

PETTIT, C. J. This suit was brought by the appellee against the appellants, to recover damages for an illegal arrest, imprisonment, prosecution, and causing him to be fined on the charge of being found drunk, under the ninth section of the Baxter bill of 1873.

The defendants answered jointly and separately, by the general denial and by a third paragraph in justification under the ninth section of said law.

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A demurrer for want of sufficient facts was sustained to this paragraph, and this ruling is assigned for error.

This section has been held to be unconstitutional, or, in other words, that it is not law. *The State v. Young*, 47 Ind. 150. No question in law is better settled, and this is admitted by the counsel for the appellants in their brief, than that ministerial officers and other persons are liable for acts done under an act of the legislature which is unconstitutional and void. All persons are presumed to know the law, and if they act under an unconstitutional enactment of the legislature, they do so at their peril, and must take the consequences.

There was no error in sustaining the demurrer to this paragraph of the answer.

It is also assigned for error that the complaint is not sufficient to constitute a cause of action; but this question is not pressed, or relied upon, nor is there any ground for it. The complaint is clearly sufficient.

The judgment is affirmed, at the costs of the appellants.

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(50 Ind. 487.)

Criminal law — discharge of jury in defendant's absence.

Defendant was tried for murder — the jury disagreed, and in the absence of defendant were discharged by the court. *Held*, that a further prosecution of defendant was barred.

INDICTMENT for murder. The opinion states the case.

C. A. Buskirk, Attorney-General, and *J. M. Cropsey*, Prosecuting Attorney, for the State.

W. W. Leathers, for appellee.

BIDDLE, C. J. Robert Wilson, with John Cope, was indicted for murder. Wilson pleaded not guilty to the indictment, and was put upon trial by jury. The trial progressed, the evidence was introduced, the argument of counsel heard, and instructions of the court given. The jury retired to consider of their verdict, and, after deliberating thirty-two hours, were returned into court. They were interrogated by the court as to what the probability was of their agreeing upon a verdict.

and they answered, "there was none." Thereupon the court discharged the jury from the further consideration of the cause. The appellee afterward specially pleaded the discharge of the jury in bar of the further prosecution of the case.

The plea sets out the proceedings formally, and avers that "such proceedings were then and there had in said case, that on the 20th day of November, 1874, the said jury, having been duly charged by the said court, at the hour of eleven o'clock and twenty-five minutes, A. M., of said last-mentioned date, they retired under the charge of a sworn bailiff of said court to consider of their verdict, and that said jury continued their deliberations till the hour of fifteen minutes before eight o'clock, P. M., of the 21st day of November, 1874, and having failed to agree upon their verdict, they, the said jury, were thereupon brought into court by their said bailiff, by the order of said court, in the absence of this defendant, the said Robert Wilson, and while he was then confined and restrained in the jail of said county, and without his knowledge or consent, directly or indirectly; and the said court proceeded then and there to interrogate said jury upon the probability of their agreeing upon a verdict in said cause, and the said jury then and there informing the said court that there was no probability of their agreeing upon a verdict in said cause, the said court thereupon discharged the said jury from a further consideration of said cause, this defendant, the said Robert Wilson, not being then and there present, but being then confined and restrained in the jail of said county by the sheriff thereof, and without his knowledge or consent as aforesaid."

The State demurred to this plea for want of sufficient facts. The demurrer was overruled, and proper exception taken.

We are of opinion that the discharge of the jury, under the circumstances averred in the plea, would have been proper, if the appellee had been present in court, even though he had objected to the discharge, unless he had shown some good ground why the jury should not have been discharged; and in such case the discharge could not have been pleaded in bar of the further prosecution of the case. *McCorkle v. The State*, 14 Ind. 39; *The State v. Walker*, 26 id. 346; *Shaffer v. The State*, 27 id. 131; *The State v. Leunig*, 42 id. 541, and *Kingen v. The State*, 46 id. 132.

The more difficult question is: What was the effect of the enforced absence of the prisoner from court at the time the jury was discharged?

It was the right of the prisoner to be present at the trial during all its stages. "No person prosecuted for any offense punishable by death, or by confinement in the State prison, or in the county jail, shall be tried

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unless personally present during the trial." 2 G. & H. 412, § 94. How far a prisoner may waive this right, either expressly or by his voluntary absence, need not be discussed here, as the question is not in the case. By the averments in the plea, the prisoner waived no right, and could not possibly have been present, by his own act, at the time the jury was discharged. A verdict against the prisoner, under such circumstances, would have been erroneous, and some authorities hold such a verdict void. *State v. Hurlburt*, 1 Root, 90; *State v. Braunschweig*, 36 Mo. 397; *Price v. The State*, 2 Morris' St. Cas. 1168; *Dunn v. The Commonwealth*, 6 Penn. St. 384; *Dougherty v. The Commonwealth*, 69 id. 266; *Sneed v. The State*, 5 Ark. 431. A verdict of acquittal, under such circumstances, would, of course, forever bar a further prosecution.

It remains for us to decide what ought to be the effect, where no verdict is rendered, and the jury is discharged, according to the facts alleged in the plea. We have been unable to find any decision or precedent to guide us in such a case. Mr. Wharton, in speaking of the presence of the prisoner at the reception of the verdict, says :

"In felonies such presence is essential; and cases have not been unknown where the courts have refused to permit this right to be waived. Thus a verdict of burglary was set aside in Pennsylvania, when it was taken in the defendant's absence, although his counsel waived his right to be present." Whart. Crim. Law, § 2999; *Prine v. The Commonwealth*, 18 Penn. St. 103; *Andrews v. The State*, 2 Sneed, 550; and *Jackson v. The Commonwealth*, 19 Gratt. 656.

In the same section the author continues :

"It is scarcely necessary to say that in cases where corporal punishment may be assigned, absence during rendition of the verdict, without waiver, vitiates the proceedings. And in fact this is exacted by the common-law form, which requires the jury to look on the prisoner, and the prisoner to look on the jury, when the verdict is rendered. The better view is that in capital, if not in all felonies, the record must show that the defendant was present at trial, verdict, and sentence."

It is held, too, and we believe it is the universal practice in all felonies, that the prisoner, after verdict and before sentence, shall be inquired of by the court if he has any thing to offer why the judgment of the law should not be pronounced against him. And even at this stage of the case he may move in arrest of judgment, for want of sufficient certainty in the indictment as to person, time, place, or offense; and if his objections be valid, the whole proceedings shall be set aside. 4 Bl. Com. 875; 2 G. & H. 420, § 122.

What the prisoner, in the case before us, if he had been present, might

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have offered to the court to show why the jury should not have been discharged, or whether any thing, indeed, it is impossible for us to know; but we are unwilling to adopt a rule which would deny him the right to offer whatever was in his power.

We think the facts stated in the plea constitute a sufficient bar to any further prosecution of the case, and that the court committed no error in overruling the demurrer.

The judgment is affirmed.

Judgment affirmed.

HUTSON V. MERRIFIELD.

(51 Ind. 24.)

Insurance — descent of life policy.

A wife took a policy of insurance upon the life of her husband. She died before her husband. *Held*, that she had such an interest in and ownership of the policy and right to the proceeds as would at her death descend to her heirs, notwithstanding the husband was living.*

ACTION to determine right to life insurance moneys. The facts appear in the opinion.

W. G. George, A. L. Osborn, W. H. Calkins, and G. Pfleger, for appellant.

A. Anderson and L. Hubbard, for appellee.

DOWNER, J. This is a controversy between two administrators, each representing a different estate.

The facts out of which the question in dispute grows are these: Newton Bingham and Emma L. Bingham were husband and wife. On the 23d day of March, 1867, Emma L. obtained from the New York Life Insurance Company a policy on the life of her husband. So much of the policy as it is material to set out reads as follows.

“This policy of insurance witnesseth, that the New York Life Insurance Company, in consideration of the representations made to them in the application for this policy, and of the sum of sixty-three dollars and thirty cents to them in hand paid by Emma L., wife of Newton Bingham, and of the annual premium of sixty-three dollars and thirty cents, to be

* See *Continental Life Insurance Company v. Palmer*, ante. p. 530.

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paid annually on or before the 23d day of March in every year during the continuance of this policy, do assure the life of Newton Bingham, merchant, of Mishawaka, in the county of St. Joseph, State of Indiana, in the amount of three thousand dollars, for the term of his natural life, commencing on the 23d day of March, 1867, at noon. And the said company do hereby promise and agree to and with the said assured, her executors, administrators and assigns, well and truly to pay, or cause to be paid, the said sum assured, to the said Emma L. Bingham, or legal representatives, within sixty days after due notice and proof of interest (if assigned or held as security) and of the death of the said Newton Bingham. And in case of the death of said Emma L. Bingham before the decease of the said Newton Bingham, the amount of said insurance shall be payable after her death to her children for their use, or to their guardian, if under age, within sixty days after due notice and proof of the death of the aforesaid Newton Bingham, as aforesaid, deducting therefrom all notes or credits of premiums on this policy unpaid at the time," etc.

Emma L. Bingham died July 3d, 1868, leaving surviving her her said husband, her father and mother, and brothers and sisters. Newton Bingham died November 24th, 1868, leaving surviving him his father, and also brothers and sisters. They left no children.

The appellant took out letters of administration on the estate of Emma L. Bingham, and the appellee took out letters on the estate of Newton Bingham.

The insurance company paid the money to the appellant, as administrator of the estate of Emma L. Bingham. Upon settlement and distribution of the estate of Emma L. Bingham, it became a question how the money was to be distributed; whether the appellee, as administrator of the estate of Newton Bingham, was entitled to any part of the money, and if so, how much or what part of it; and also whether the appellant should be credited in his account with certain payments which he had made out of the fund in discharge of debts of the estate of said Newton Bingham.

The opinion and judgment of the court, as set out in the record, was as follows :

[The court below decided that the administrator of the estate of Newton Bingham was entitled to three-fourths of the estate of Emma L. Bingham, the same being the distributive share of Newton Bingham.]

To this ruling exception was taken, and the question properly reserved in the Common Pleas. It is here assigned as error.

The position upon the main question taken by counsel for the appel-

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lee, and which was sustained by the Common Pleas, is, that the policy was a part of the estate of Emma L. Bingham, and that at her decease it passed to her personal representatives for the payment of her debts and for distribution of the residue among her heirs under the statute of descents and distributions.

Counsel for appellant contend that the policy was the property of Emma L.; became valuable on the death of her husband, but had no particular value until that time; that her husband at her decease could not inherit; that personal property vests in the heirs only when distribution is made, and until that time the title is in the executor or administrator, who holds it in trust; that the husband could not take an interest in the policy as heir, because it was not due until after his death; that the policy represented a mere expectancy of the wife, and there was nothing to take until his death; that the husband takes nothing in the character of husband, but takes as heir. How, then, it is asked, could the husband's administrator have collected the money on this policy? It was not payable to him; it was payable to his wife or her legal representatives. Counsel suppose it is a novel proposition that a person can inherit or take as heir the avails of his own death and transmit the same to his personal representatives. If he could not and did not take an interest, then it is quite clear, as counsel think, that his personal representatives cannot. Their claim must be under and through him, and cannot be of any greater interest than his at and before his death.

Counsel for appellant claim that there was no property in the policy which could descend to heirs until after the decease of the party on whose life it was written; that accordingly, since Newton Bingham must have died before there was a right to receive the money under the policy, he could not take any part of it either by descent or distribution.

In 1848, an act was passed by the legislature, in terms authorizing a wife to insure the life of her husband, and providing how the money should be disposed of when received. Acts 1848, p. 31. This statute would seem to have been repealed by the revision of 1852. . G. & H. 534. We know of no statute now in force on this subject. No question is made in this case, however, as to the validity of the policy, or the right of the wife, had she survived her husband, to have and enjoy the proceeds of the policy as her own separate estate.

At the commencement of our examination of the question involved, it may be well enough to say that the clause of the policy by which the children of Mrs. Bingham were entitled to the money in the event of her death before the death of her husband, may be entirely laid out of view in disposing of the case. As there were no children to take the

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money under this clause of the policy, it may properly be regarded as if that clause had been wholly omitted from it. Had there been children of Mrs. Bingham, it is very well settled that they would have taken the money, to the exclusion of every one else, upon her death before that of her husband. *Swan v. Snow*, 11 Allen, 224; *Burroughs v. State Mut. Life Ass. Co.*, 97 Mass. 359; *Chapin v. Fellowes*, 36 Conn. 132.

A policy of insurance is a chose in action governed by the same principles applicable to other agreements involving pecuniary obligations. Bliss on Life Ins. 506. A life policy is an agreement to pay a sum of money at the termination of the life insured. The party holding and owning such a policy, whether on the life of another or on his own life, has a valuable interest in it, which he may assign, either absolutely or by way of security, and it is assignable like any other chose in action. Bliss on Life Ins. 506, *et seq.*; *St. John v. The American Mutual Life Ins. Co.*, 3 Kern. 31; *St. John v. The American Mutual Life Ins. Co.*, 2 Duer, 419; *Palmer v. Merrill*, 6 Cush. 282; *Ashley v. Ashley*, 3 Simons, 149.

The policy itself in this case shows that it was intended to be assignable, for it requires proof of interest "if assigned or held as security," and it is payable to the assured, her executors, administrators and assigns."

This being true, it seems to us that Mrs. Bingham had such an interest in and ownership of the policy, and such a right to the proceeds as would descend to her heirs, and this is so notwithstanding the person insured was yet living. If the policy is a chose in action, it is personal property, which at the death of the party holding and owning it would vest in the heirs of such person, subject to the payment of debts. That the amount of the policy is not payable until the death of the life insured can make no difference. Suppose that Mrs. Bingham had owned a policy on the life of some one other than her husband, payable to her, and she had died, would there be any question but that the policy would have gone to her personal representatives and ultimately to her heirs by distribution? We think not. It can make no difference that the policy was on the life of her husband. We think counsel for appellant misapprehend the position of counsel for the appellee. They do not contend that the title to and ownership of the policy would, on the death of the wife, vest in the husband as it was previously vested in the wife. But they contend, as we understand them, that it is part of her personal estate, and that it did at her death vest in her representatives and should go to her heirs by distribution.

The statute of descents applies to personal as well as real property,

and vests the ownership in the heirs immediately on the decease of the owner, subject to be divested on the appointment of a personal representative. *Coldron v. Rhode*, 7 Ind. 151 ; 1 G. & H. 251, § 1, *et seq.*

The section applicable in this case is section 25, p. 296, 1 G. & H., which provides, that "if a husband or wife die intestate, leaving no child, but leaving father and mother, or either of them, then his or her property, real and personal, shall descend three-fourths to the widow or widower, and one-fourth to the father and mother jointly, or to the survivor of them," etc.

Had Newton Bingham continued to live, it seems that the administrator of his wife's estate might have sold and assigned the policy and distributed the money realized therefor as assets of the estate.

We cannot think the position of counsel for appellant can be correct, when they assume that the right to the proceeds of the policy was not fixed until the death of the husband. Their case requires them, however, to maintain this proposition, and, to make out a title in their client to the whole amount of the money, they must establish the proposition that at the death of the husband the descent took place of property owned and held by Mrs. Bingham, who had died some time before. They must sustain the position that at the death of the party holding and owning a policy on the life of another, the title to the policy does not then descend to any one, but that on the death of the life insured the ownership of the policy descends to and vests in those who are then the heirs of the holder of the policy, although such holder was dead long before that time. By doing this, and only by doing this, can it be maintained that those who were next of kin to the deceased holder of the policy at the time of her death are deprived of their distributive share of the proceeds of the policy. We think the position untenable.

With reference to that part of the judgment of the court refusing to allow certain of the credits claimed by the appellant in his report, we have had some hesitation. As, however, some of the claims paid appear to be proper claims against the estate of Newton Bingham, either in whole or in part, we have come to the conclusion that they should, so far as they were legal and valid claims against his estate, have been allowed. It is objected to this view of the question that it does not appear that there are not other creditors of the estate of Newton Bingham who may be entitled to share in the fund. This is true. But some of the payments were made in discharge of preferred claims, which would probably have to be paid in full in any event. Such are the items for funeral expenses, expenses of last sickness, etc. We do not mean, however, to decide which or how many of the items should be allowed,

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or whether the whole or only a proportionate part of them shall be allowed. This can be determined by the Circuit Court on another hearing of the cause.

The judgment is reversed, with costs, and the cause remanded for a new trial.

Judgment reversed.

 OHIO & MISSISSIPPI RAILWAY Co., appellant, v. YOHE.

(51 Ind. 181.)

Common carrier — liability of, for goods taken from him under legal process.

A common carrier is excused from liability for not carrying and delivering goods received for carriage, when they are, without his fault, act or connivance, seized and taken from his possession by virtue of legal process. It is necessary, however, for him to give immediate notice to the shipper of such seizure.*

ACTION for loss of goods shipped by common carrier. The facts appear in the opinion.

W. H. De Wolf and H. P. Buxton, for appellant.

J. G. Reily and W. O. Johnson, for appellees.

DOWNEY, J. This was an action by appellees against the appellant as a common carrier. The action was commenced in Knox county, and the venue changed to Martin.

It is alleged in the complaint that the plaintiffs' consignors, on the 3d of November, 1873, delivered to the appellant, at Bridgeport, Illinois, a quantity of wheat, to be carried to Vincennes, Indiana, and delivered to the appellees. The appellant signed and delivered a bill of lading evidencing the contract, and this is the foundation of the action.

It is alleged that the company failed to deliver the wheat according to the contract, etc. A demurrer to the complaint was filed and overruled.

The defendant moved the court, on affidavit, to stay the action until the determination of an action of replevin in Illinois, involving the title and ownership of the property, brought by one Johnson. This motion having been overruled, the defendant asked that Johnson be made a party to the action, which request was also refused. Thereupon the

* See *Edwards v. White Line Transit Co.*, 6 Am. Rep. 213.

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defendant pleaded, in substance, that while the wheat was in a car of the company at Bridgeport, awaiting the coming of a train and engine to transport it to Vincennes, in accordance with the bill of lading, without any act, fault or connivance of the defendant, or of any of her agents, servants or employees, Johnson sued out of the office of the clerk of the Circuit Court of Lawrence county, Illinois, a writ of replevin, the said Johnson then and there claiming to be the owner and entitled to the possession of said wheat, and, by virtue of said writ, the sheriff of said county seized and took the same out of the possession of the defendant, and delivered the same to said Johnson, according to law and the command of said writ, and the said Johnson took possession thereof; that said action is yet pending, by reason whereof the defendant was prevented from transporting said wheat to said city of Vincennes and delivering the same to the plaintiffs. It is averred that said Lawrence Circuit Court had jurisdiction, and certified copies of the papers and process in the action of replevin, etc., are filed with the answer.

A demurrer to this answer, on the ground that it did not state facts sufficient to constitute a defense to the action, was filed by the plaintiffs and sustained by the court. The defendant declining to answer further, there was judgment for the plaintiffs.

It is objected to the complaint that it does not show that the plaintiffs own the wheat, or that they are the consignees mentioned in the bill of lading. There is no foundation for these objections. The complaint alleges that the plaintiffs purchased the wheat of the consignors; that the consignors delivered the same to the defendant; and that the defendant executed the bill of lading to the plaintiffs.

It is further assigned as error, that the court improperly sustained the demurrer to the answer.

The question presented is this, is a common carrier of goods excused from liability for not carrying and delivering the goods, when they are, without any act, fault or connivance on his part, seized, by virtue of legal process, and taken out of his possession?

It is impossible for the carrier to deliver the goods to the consignee, when they have been seized by legal process and taken out of his possession. The carrier cannot stop, when goods are offered to him for carriage, to investigate the question as to their ownership. Nor do we think he is bound, when the goods are so taken out of his possession, to follow them up, and be at the trouble and expense of asserting the claim thereto of the party to or for whom he undertook to carry them. We do not think it material what the form of the process may be. In every case the carrier must yield to the authority of legal process.

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After the seizure of the goods by the officer, by virtue of the process, they are in the custody of the law, and the carrier cannot comply with his contract without a resistance of the process and a violation of law.

The right of the sheriff to hold the goods involved questions which could only be determined by the tribunal which issued the process or some other competent tribunal, and the carrier had no power to decide them. If the goods were wrongfully seized, the plaintiffs have their remedy against the officer who seized them, or against the party at whose instance it was done. As between these parties, the process would be no justification, if the plaintiffs were the owners and entitled to the possession of the goods.

It makes no difference, we think, that the process was issued by a tribunal of a State different from that in which the plaintiffs reside. The rule must be the same as in a case where the process emanates from a court in the State of the plaintiff's residence.

It cannot be denied that the carrier must obey the laws of the several States in which it follows its calling. The laws of Illinois which give force and effect to a writ of replevin must be obeyed. It cannot say to the sheriff, who is armed with a writ issued in due form of law, commanding him to take the property, that it has executed a bill of lading, and thereby agreed to transport the property to another State, and therefore he cannot have it. The sheriff would have the right, and it would become his duty, to call out the power of the county to aid in serving his lawful process.

The carrier is deprived of the possession of the property by a superior power, the power of the State — the *vis major* of the civil law — and in all things as potent and overpowering, as far as the carrier is concerned, as if it were the "act of God or the public enemy." In fact, it amounts to the same thing; the carrier is equally powerless in the grasp of either.

In Redfield on Railways, vol. 2, p. 158, the learned author says that it is settled that the bailee may defend against the claim of the bailor, by showing that the goods have been taken from him by legal process. And in a note he adds: "If this defense were not valid, it might compel the party to resist the acts of a public officer in the discharge of his duty, which the law will never do."

In New York, where property was forcibly seized by a constable, on a complaint that the property had been stolen, the court said: "But my associates, not passing upon the question whether the property was delivered to the true owners, desire to put this case upon the doctrine that the common carrier is exonerated from his obligation to his bailor, where

the property of the latter is taken from him by due legal process, provided the bailor is promptly notified of such taking. * * * The judgment of the Supreme Court should therefore be affirmed. All affirm, on the ground that when the property is taken from the carrier by legal process, and he gives notice thereof, he is discharged." *Bliven v. Hudson River R. R. Co.*, 36 N. Y. 403.

In this same case, in the Supreme Court, it was held, that "the bailee must assure himself, and show the court that the proceedings are regular and valid, but he is not bound to litigate for his bailor, or to show that the judgment or decision of the tribunal issuing the process, or seizing the goods, was correct in law or in fact. This is the rule as to bailees in general, and it includes the case of common carriers." *Bliven v. Hudson River R. R. Co.*, 35 Barb. 191.

In a case where goods were seized on attachment, the court held: "If goods are taken from a bailee or carrier by authority of law, in any case coming within these exceptions, there is no doubt that it is a good defense to an action by the bailor or shipper, for a non-delivery." *Van Winkle v. United States Mail Steamship Co.*, 37 Barb. 122.

In Vermont, where goods in the hands of a wharfinger were seized under legal process, the court held that if they are taken from the wharfinger or warehouseman by lawful process, the wharfinger or warehouseman can protect himself in a suit brought against him by the owner. *Burton v. Wilkinson*, 18 Vt. 188.

In the Supreme Court of the United States, where goods in the hands of a carrier had been attached by a third party, in a suit brought by the consignees on a bill of lading, Mr. Justice NELSON, in delivering the opinion of the court, said: "After the seizure of the goods by the sheriff, under the attachment, they were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the goods to have been, at the time, in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the judgment upon the attachment. It is true that these goods had been delivered to the defendant, as carriers by the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons; but this circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant nor that of the plaintiffs. The law on this subject is well settled, as may

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be seen on a reference to the cases collected in sections 453, 290, 350, of Drake on Attachment, second edition." *Stiles v. Davis*, 1 Black, 101.

The above case is the same as the case at bar, with the single exception that in *Stiles v. Davis* the goods were seized under an attachment, while in this case they were seized under a writ of replevin.

There is a defect, however, in the answer, which justified the Circuit Court in holding it bad, and that is the want of an averment that the defendant gave immediate notice to the plaintiffs that the goods had been seized and taken out of its possession. That the carrier should do this, seems to be a necessary and reasonable qualification of the rule. The rule is laid down with this qualification in *Bliven v. The Hudson River R. R. Co.*, *supra*. The only averment as to notice in the answer is this: "And the defendant further avers that said plaintiffs had notice before the commencement of this suit, that said action of replevin was pending," etc. The bill of lading bears date November 3d, 1873. The writ of replevin bears date November 5th, 1873. The wheat was taken and delivered to Johnson on the 6th day of November, 1873. The record does not show when this action was commenced. The first date given is that of the filing of the amended complaint, February 7th, 1874. There is nothing from which we can find that proper diligence was used by the carrier in giving notice of the seizure of the goods.

It may be repeated that the wheat was received by the defendant on the 3d day of November, 1873, and was not seized until the 6th. It is probable that a satisfactory excuse or reason should be alleged why the wheat was not moved before the seizure. The answer admits the receipt of the wheat and the execution of the bill of lading, on the 3d of November, and then alleges, "and thereupon said wheat was loaded into a car of defendant then standing upon her said side track, at said town of Bridgeport, and while said wheat was in said car, and so upon said track, and awaiting the arrival of a train and engine to transport the same to the city of Vincennes aforesaid, in accordance with the terms of said bill of lading and without the act, fault or connivance of the defendant or of any of her agents, servants or employees, one Benjamin F. Johnson sued out," etc. It is very questionable whether this shows proper diligence on the part of the carrier. We need not, however, decide this question. Clearly, we think, the carrier cannot make use of the fact that the property has been seized by legal process to shield himself from liability for his own negligence, or to justify any improper confederation with the party or officer seizing the goods.

The rulings of the court on the motion to stay the proceedings in the

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action, and to cause Johnson to be made a party to the action, were proper for the reasons stated in determining the validity of the answer.

A question is made concerning the publication of a deposition taken by the plaintiff, which, it is contended, was not properly directed on the envelope. But as the deposition was not used on the trial, the defendant could not have been injured by this ruling.

The judgment below is affirmed, with costs.

Judgment affirmed.

BRIGHT, appellant, v. LORD.

(51 Ind. 272.)

Dividend — title to, upon stock contracted to be sold.

L. contracted previous to July 3, to sell shares of stock in a corporation to B. at B.'s option, to be accepted by July 16. On the last-named day the shares were transferred to B. On July 3, a dividend on the stock was declared payable August 1. *Held*, that the dividend belonged to L.*

ACTION to determine right to dividend upon corporate stock. The facts appear in the opinion.

J. E. McDonald, J. M. Butler, H. W. Harrington, and H. Francisco, for appellant.

N. B. Taylor, F. Rand, E. Taylor, B. Harrison, C. C. Hines and W. H. H. Miller, for appellees.

BIDDLE, C. J. The facts averred in the appellant's complaint are as follows :

That on the 1st day of April, 1873, the appellant entered into a provisional contract with John M. Lord, John Lord, and Charles M. Lord, by which they agreed to sell to the appellant five hundred and twenty shares of the capital stock of the Indianapolis Rolling Mill Company, of fifty dollars each, for the sum of thirteen thousand dollars, at the option of the appellant, to be by him taken at any time on or before the 18th day of June, 1873, to be paid for on delivery ; that before the expiration

* See *Burroughs v. N. C. R. R. Co.*, 12 Am. Rep. 611.

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of said option, on the 14th day of June, 1873, the said Lords, for the consideration of one hundred dollars, to them paid by appellant, extended the time of said provisional contract for thirty days, within which time the appellant paid the Lords thirteen thousand dollars, and received the stock, which, on the 16th day of July, 1873, was duly transferred to him on the books of the Rolling Mill Company; that the appellant purchased the stock without the reservation of any dividends or earnings, and with all the benefits and interests that pertain to the same; that on the 3d of July, 1873, the board of directors of the Rolling Mill Company declared a dividend on the capital stock of the company of five per cent, to be paid on the 1st day of August ensuing, amounting, on the stock, etc., purchased by the appellant, to thirteen hundred dollars, which the appellant claims; that the company was about to pay the said thirteen hundred dollars to the Lords, who also claimed the amount. Prayer to restrain the company from paying the thirteen hundred dollars to the Lords, to decree the amount to the appellant, and for general relief.

The Rolling Mill Company was served with process, but made default.

Interlocutory proceedings were had after complaint and before answer, but as no question is raised upon them, they are not stated.

The Lords answered by a general denial. The case was submitted to the court for trial, which resulted in a finding for the defendants. Motion for a new trial overruled. Exception. Appeal to the General Term, where the judgment was affirmed, from which an appeal was taken to this court.

The only error assigned here is in affirming the judgment at the General Term. The evidence is before us, and we think it fairly proves the allegations in the complaint.

Was the appellant entitled to the dividend declared while it was optional with him to purchase or refuse the stock, and before the purchase was completed? This is the sole question in the case.

Where a stockholder in a railroad assigned and transferred his stock after two years' interest had accrued, which, by a resolution of the company, was payable annually, and had been carried to the account of the stockholder, it was held that the interest did not pass by the assignment of the stock; the court stating the rule to be, that "the interest follows the principal, as an incident to it, so long as it remains an incident; but when it is separated and set apart from the principal by actual payment, or by being carried, when due, to the credit of the owner of the principal in his account with the debtor, and this in pursuance of a provision in the contract creating and defining the principal debt, it is so separated and disjointed from the principal as to cease to be an incident to, and

does not follow it." *The City of Ohio v. The Cleveland, etc., R. R. Co.*, 6 Ohio St. 489. And in the case of *Jones v. The Terre Haute & Richmond R. R. Co.*, 29 Barb. 353, it was held, that "where, by a resolution of the board of directors, a dividend is made to the persons then holding stock, without any discrimination out of the surplus earnings of the corporation for a given period, payable at a future day, all who are stockholders on the books of the company, at the time the dividend is declared, are entitled to share therein." This case seems to us as being remarkably similar to the one before us. It has also been held that the purchaser of a share of stock in a corporation has the right to receive all future dividends, from whatever source the profits may arise, provided he remain a member of the corporation until a dividend is made. *March v. The Eastern R. R. Co.*, 43 N. H. 515.

The same rule was recently held in England. The testatrix was owner of certain shares in the South Australian Banking Company. On the 7th day of June, 1865, dividends were declared by the company, payable on the 15th of July, 1865, and on the 15th of January, 1866. On the 31st of December, the testatrix died, having made her will, devising the stock, in 1863.

The question arose as to whether the dividend due on the 15th of January, 1866, passed to the devisee, or belonged to her residuary estate.

Sir W. PAGE WOOD, V. C., said: "As soon as the dividend was declared, although payment, for the convenience of the company, was postponed until the following January, from that moment the testatrix became entitled to it, although she could not have then recovered it, and it would have passed to her legatee had she specifically bequeathed it." *De Gendre v. Kent*, 4 Equity Cases, 283.

In an American case, still later, it was held that a dividend belongs to the owner of the stock, at the time the dividend is actually declared, and that dividends made to the stockholders after the death of a testator belong to the widow who owns the stock, but if made before, although payable afterward, they will pass by the devise. *Brundage v. Brundage*, 65 Barb. 397.

In support of this general principle, see, also, *In re Foote*, 22 Pick. 299; *Clapp v. Astor*, 2 Edw. Ch. 379; *Phelps v. Farmers and Mechanics' Bank*, 26 Conn. 269; *Hyatt v. Allen*, 56 N. Y. 553.

From the authorities and upon principle, we think the rule may be deduced, that whoever owns the stock in a corporation at the time a dividend is declared owns the dividend also; and a sale of the stock afterward will not carry the dividend with it, though it may not be paid, or

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payable, until after the sale. The same rule governs in the sale of bonds or other securities, where the interest is payable at stated periods, as upon coupon bonds; but when the interest is accruing from day to day, whatever is due on the bond or other security at the time it is sold, will pass with it. The reason of the distinction is, that when the interest accrues from day to day, it is divisible and payable at any time; but when the interest is payable at stated periods, no part of it is due until the period arrives; and in the earnings or profits of stocks, it is impossible to know what amount is due until the dividend is declared.

In the case before us, Bright did not become the owner of the stock until the 16th day of July, 1873. Up to that time, it was optional with him to purchase it or refuse it. The Lords would have had no remedy, if Bright had refused the stock, and Bright would have suffered no loss, except the consideration he had paid for the option, and incurred no liability whatever. The dividend had been declared on the 3d day of July, 1873, and the amount fixed, by which it became the property of the Lords at that time, although not payable until the 1st day of August ensuing; and there is nothing in the complaint to inform us but what Bright knew all these facts at the time he completed the purchase of the stock. At least, ordinary business diligence would have informed him of the facts, if he did not actually know them, and then he could have purchased the stock, as it then stood, or not, at his option. As he had not averred in his complaint that he did not know these facts, and could not have ascertained them by ordinary business diligence, he must be held to have known them, and to have made his purchase accordingly.

The judgment is affirmed.

Judgment affirmed

HOLMES v. MCCRAY.

(51 Ind. 358.)

Statute of frauds — partnership may be formed by parol to deal in lands.

A parol agreement for a partnership for the purpose of dealing in lands is not within the statute of frauds, and is valid.

ACTION to enforce the performance of a partnership agreement brought by William C. Holmes against Aaron McCray. The pleadings set forth the existence of an agreement between plaintiff and defendant to form a partnership to buy and sell lands. The complaint

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alleged a transaction thereunder. To an answer containing a general denial and alleging that the only agreement was a verbal one, plaintiff demurred. The demurrer was overruled, and from judgment thereon plaintiff appealed.

J. T. Dye and A. C. Harris, for appellant.

Taylor, Rand & Taylor, and *Gordon, Browne & Lamb*, for appellee.

BIDDLE, C. J. [After stating the facts.] Both parties seem to think that the case must turn upon the question whether the agreement as alleged in the complaint, not being in writing and signed by the party to be bound, comes within the statute of frauds, and have exhaustively discussed the question in that view ; and we think this is the main question in the case, as we cannot clearly see, as the case stood, that the court erred in granting the motion for a new trial.

That a valid agreement of partnership for the purpose of dealing in personal property may be made by parol, admits of no doubt, but whether such an agreement for the purpose of dealing in real estate can be made by parol, is not uniformly settled by the authorities. The latest and best authority we have been able to find upon the subject is the case of *Chester v. Dickerson*, 54 N. Y. 1, in which EARL, C., in delivering the opinion of the court, says : " It cannot be questioned that two or more persons may become partners in buying and selling land. There is nothing in the nature or essence of a partnership which requires that it should be confined to ordinary trade and commerce, or to dealings in personal property. * * * It is necessary to inquire whether a partnership, in reference to lands, can be formed and proved by parol. Upon this question there is considerable conflict in the authorities. On the one hand it is claimed that a parol agreement for such a partnership would be within the statute of frauds, which provides that no estate or interest in lands shall be created, assigned or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning or declaring the same ; and to this effect is the case of *Smith v. Burnham*, 3 Sumner, 435. On the other hand it is claimed that such an agreement is not affected by the statute of frauds, for the reason that the real estate is treated and administered in equity as personal property for all the purposes of the partnership. A court of equity having full jurisdiction of all cases between partners touching the partnership property, it is claimed that it will inquire into, take an account of, and administer upon all the partnership property, whether it be real or personal, and in

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such cases will not allow one partner to commit a fraud or a breach of trust upon his copartner by taking advantage of the statute of frauds; and to this effect are the following authorities: *Dale v. Hamilton*, 5 Hare, 369; *Essex v. Essex*, 20 Beav. 449; *Bunnel v. Taintor*, 4 Conn. 568. A full discussion of the question is found in *Dale v. Hamilton*; and the reasoning and review of the cases there are quite satisfactory. The doctrine is there laid down that 'a partnership agreement between A and B, that they shall be jointly interested in a speculation for buying, improving for sale and selling lands, may be proved without being evidenced by any writing, signed by or by the authority of the party to be charged therewith within the statute of frauds; and such an agreement being proved, A or B may establish his interest in land, the subject of the partnership, without such interest being evidenced by any such writing.' I am inclined to think this doctrine to be founded upon the best reason and the most authority. * * *

"Suppose two persons, by parol agreement, enter into a partnership to speculate in lands, how do they come in conflict with the statute of frauds? No estate or interest in land has been granted, assigned or declared. When the agreement is made no lands are owned by the firm, and neither party attempts to convey or assign any to the other. The contract is a valid one, and in pursuance of this agreement they go on and buy, improve and sell lands. While they are doing this, do they not act as partners and bear a partnership relation to each other? Within the meaning of the statute in such case neither conveys or assigns any land to the other, and hence there is no conflict with the statute. The statute is not so broad as to prevent proof by parol of an interest in lands; it is simply aimed at the creation of conveyance of an estate in lands without a writing."

As between the partnership and its vendors or vendees in the sale or purchase of lands, the statute in all cases would operate; but as between the partners themselves, when they are neither vendors nor vendees of one another, we cannot see how the statute can affect their agreements.

We think the reasoning in this case is sound, and well supported by the authorities cited. If this view be correct, the court erred in overruling the demurrers to the second, third and fourth paragraphs of answer.

The judgment is reversed, with costs; cause remanded, with instructions to sustain the demurrers to the second, third and fourth paragraphs of answer and to proceed according to this opinion.

Judgment accordingly.

Stewart v. Jessup.

SNODDY v. HOWARD.

(51 Ind. 411.)

Jurisdiction — of State courts over offenses against Federal currency.

The power to punish for offenses against the Federal currency is not granted exclusively to the United States, and the courts of Indiana have, under the law of that State, jurisdiction to convict of the crime of knowingly having in possession apparatus made use of for counterfeiting United States coin.

PETITION for *habeas corpus*. The facts appear in the opinion.

P. H. Jewett, for appellant.

H. J. Reed, for appellee.

BIDDLE, C. J. Petition by Henry Snoddy, to the Hon. George A. Bicknell, Judge of the Fourth Judicial Circuit, against Andrew J. Howard, warden of the State prison south, praying for the writ of *habeas corpus*. The writ was granted, and the warden made return thereto, that he held said Snoddy by virtue of a judgment of the Morgan Circuit Court, convicting him of the crime of unlawfully, feloniously, and knowingly retaining possession of certain dies and plates made use of in counterfeiting certain silver coin then current in the State of Indiana, of the denomination of five cents, commonly called "nickels," contrary, etc., whereon it was adjudged that the said Snoddy be imprisoned in the State prison for the period of two years, making the record of said judgment a part of his return.

Exceptions were filed to the return, because it did not show that the Morgan Circuit Court had jurisdiction of the offense of which the prisoner was convicted, as stated in the record. The exceptions were overruled, and the prisoner remanded. Appeal.

Had the Morgan Circuit Court jurisdiction in the case upon which the prisoner was convicted and imprisoned?

This is the only question properly raised in the record, although some other collateral points are made in the appellant's brief.

The authorities are not uniform upon this question in the various States. In *Mattison v. The State*, 3 Mo. 421, it was held that an act which punished counterfeiting the current coin was void, as being in conflict with the Constitution of the United States. In *Rouse v. The State*, 4 Ga. 136, a similar question was left as a *quære*. In *Commonwealth v. Fuller*, 8 Metc. 313, and in *Harlan v. The People*, 1 Doug. (Mich.) 207 the question was answered in the affirmative.

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In the case of *Sutton v. The State*, 9 Ohio, 133, the court remarked: "We can discover no lack of power in the legislature to punish this offense."

The first case which arose in Indiana is *Chess v. The State*, 1 Blackf. 198. The indictment was for counterfeiting "forty-four eagles, current coin of the United States." Conviction. The only error assigned was, that a State court had no jurisdiction in such a case, and the court contented itself by simply affirming the judgment.

In *Donnell v. The State*, 3 Ind. 480, § 115, Rev. Stat. 1843, p. 984, making it an offense to harbor or employ a slave, was held unconstitutional, and a judgment of conviction under it reversed; but the contrary doctrine was held in *The State v. Moore*, 6 Ind. 436, and *Donnell v. The State* was overruled. *The State v. Moore* was approved in *Ambrose v. The State*, 6 Ind. 351, and in *Waldo v. Wallace*, 12 id. 569, and must be held as the law in this State.

We know of no prohibition, either in the Constitution of the United States, or in the Constitution of the State of Indiana, which denies the power of the State to punish for counterfeiting coin, or for offenses against the currency; nor is such power granted exclusively to, or exercised exclusively by, the United States, and, if not denied nor so granted it remains amongst the reserved or belongs to the inherent powers of the States.

The judgment is affirmed, at the cost of the appellant.

Judgment affirmed.

STEWART V. JESSUP.

(51 Ind. 413.)

Criminal law — false pretenses made in one State and acted upon in another.

S., who was endeavoring to purchase horses, made in Indiana false representations to K with whom he was dealing, as to his means. K. took horses into New York and relying upon the representations delivered them there to S. on credit. *Held*, that S. was not liable in Indiana for false pretenses.

PETITION for *habeas corpus*. The opinion states the case.

D. Moss and *T. J. Kane*, for appellant.

C. A. Buskirk, Attorney-General, for the State.

BUSKIRK, J. Stewart, the appellant, being confined in the jail of Hamilton county, was, upon a writ of *habeas corpus*, brought before the Circuit Court of said county. The appellee, in his return to said writ, stated that the appellant had been charged by affidavit filed before a justice of the peace of said county with obtaining possession of twelve horses by false pretenses; that, upon a preliminary examination before the said justice, he had been adjudged guilty, and required to give security in the sum of three thousand dollars for his appearance in the Circuit Court to answer said charge; that, upon his failure to give such recognizance, he had been committed to the jail of said county; and that he held him in custody under and by virtue of the *mittimus* issued by the said justice of the peace. A transcript of the proceedings before the said justice was filed with said return, including the said *mittimus*.

The cause was heard upon evidence adduced before the court, and such evidence is in the record by a bill of exceptions. The material facts are these:

The appellant resides at Corry, in the State of Pennsylvania. In June, 1874, he, in company with a man by the name of Johnson, came to Noblesville, to purchase horses. They employed John E. Kerr, who was engaged in that business, to assist them. Two car loads were purchased and shipped to the city of New York. Stewart left with the second car load of horses. Johnson remained, and he and Kerr purchased and shipped a third car load of horses. In the purchase of each car load of horses, Kerr indorsed for Stewart and Johnson for small sums, all of which were paid. Kerr testified that when Stewart was at Noblesville he represented that he, his mother, and brothers and sisters owned sixty thousand dollars of stock and property in the First National Bank of Corry, Pennsylvania. Kerr then purchased with his own money, and in his own name, a fourth car load of horses, and notified Stewart thereof by telegraph, at the city of New York. Stewart wrote him to bring the horses to the city of New York. At Buffalo, Kerr met Johnson, upon whose advice he telegraphed Stewart when and where to meet him. Upon his arrival in the city, he was met by Stewart, who informed him that he did not have the money to pay for the horses. Four of the horses were sold to obtain money to pay the expenses of the shipment. Kerr then sold the remaining twelve horses to Stewart for one thousand four hundred and forty dollars, upon thirty days' time, and took his note therefor. The note was not paid. Kerr testified that he sold the horses to Stewart upon credit, in reliance upon the representations made by him while in Indiana.

The conclusion at which we have arrived renders it unnecessary for us

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to consider and decide whether the facts proved, if they had all occurred in the State of Indiana, would amount to the crime of obtaining the possession of property by false pretenses. But see *Jones v. The State*, 49 Ind. 549, and *Keller v. The State*, 51 id. 111.

It is obvious from the evidence that Stewart obtained the possession of the horses in the State of New York. The crime attempted to be charged consisted in obtaining the possession of the horses, and that was accomplished in the State of New York. It can make no difference where the false representations were made, as they of themselves do not constitute any crime. They are simply the means by which the crime was accomplished. The question is therefore presented whether the appellant can be convicted and punished in this State for a crime committed within another State. It is settled by a well-considered case in this court, which is fully supported by the authorities therein cited, that he cannot be so convicted and punished. We refer to the case of *Johns v. The State*, 19 Ind. 421. In that case the court say :

“It may be assumed, as a general proposition, that the criminal laws of a State do not bind, and cannot affect, those out of the territorial limits of the State.

“Each State, in respect to each of the others, is an independent sovereignty, possessing ample powers, and the exclusive right to determine, within its own borders, what shall be tolerated, and what prohibited ; what shall be deemed innocent, and what criminal ; its powers being limited only by the Federal Constitution and the nature and objects of government. While each State is thus sovereign within its own limits, it cannot impose its laws upon those outside of the limits of its sovereign power. Our own Constitution has expressly fixed the boundaries of its sovereignty.” See § 2, art. 14.

In this State there are no common-law offenses. All crimes and misdemeanors must be defined, and punishment therefor fixed, by statutes of this State, and not otherwise. 1 G. & H. 415 ; *Hackney v. The State*, 8 Ind. 494.

The legislature has not attempted to define crimes and fix punishment for an offense committed outside of the limits of the State. It has provided, that “every person, being without the State, committing or consummating an offense by an agent or means within the State, is liable to be punished by the laws thereof, in the same manner as if he were present and had commenced and consummated the offense within the State.” § 2, 2 G. & H. 391.

Under the above section, the offense must be consummated within this State. The appellant was, under section 726 of the Code (2 G. & H.

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819), entitled to be discharged. There was not only a want of probable cause for his detention, but it was conclusively shown by the evidence of the prosecuting witness that he had committed no crime that was cognizable under the criminal laws of this State.

The judgment is reversed, with costs; and the cause is remanded to the court below, with directions to discharge the prisoner. The clerk of this court is directed to immediately certify this opinion to the court below.

Judgment reversed.

HORN, appellant, v. BRAY.

(51 Ind. 555.)

Statute of frauds — contract of indemnity between sureties.

A contract between sureties to the same instrument, whereby one surety undertakes to indemnify another, is not within the statute of frauds and may be made by parol.

ACTIONS for contribution by George Horn and others against Samuel Bray and Samuel L. Lefever. The facts were these. Bray was indebted to one Hays in the sum of \$800, and Hays agreed to take a promissory note therefor signed by Bray and sufficient sureties. Lefever, the father in law of Bray, signed the note as surety, but he not being deemed sufficient, he applied to plaintiff, Horn, to become surety also. To induce plaintiff to do so, Lefever then and there agreed, if plaintiff would sign, to indemnify the plaintiff, from all loss and harm. In consideration of this promise, plaintiff, Horn, signed. Lefever had the same transaction with the other plaintiffs with the same result. These agreements were verbal. The note, not being paid at maturity, was sued and judgment rendered against the plaintiffs, and they were compelled to pay the same. This action was not defended by Bray, the only question being as to the liability of Lefever. From an order of the court below striking out portions of the complaint, plaintiffs appealed.

F. J. Hord, for appellant.

S. Stansifer, for appellee.

BUSKIRK, J. [After stating the facts and passing upon an unimportant question of practice.] "It is very earnestly insisted by counsel for ap

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pellees, that the agreement set up in the portions of the complaints struck out was an undertaking on the part of Lefever to answer for the debt of Bray, and, it not being in writing, is within the statute of frauds, and hence cannot be enforced.

It is contended by counsel for appellants, that when one party, at the request of another, enters into a contract as his surety, the law implies a promise of indemnity, and that, as between the makers and the payees, the relation of the parties is fixed by the note itself; that, as to the payees, the makers are all principals and equally liable; that the rights and liabilities of the makers, amongst themselves, depend upon the contract between them, upon the relation each may sustain to the other and to the transaction; and that such contract may be created and proved by parol.

There is much conflict in the adjudged cases as to whether a contract for indemnity between sureties is within the statute of frauds. The earliest English case bearing upon the question is that of *Winckworth v. Mills*, 2 Esp. 484, decided at *nisi prius*, where it was held that where a person signed a note at the request of another upon a promise of indemnity, the promise was within the statute, as it was an agreement to answer for the debt and default of another. The next case is that of *Thomas v. Cook*, 8 B. & C. 728, where it was held that a promise of indemnity was an original contract between the parties, and hence was not within the statute. But in the subsequent case of *Green v. Cresswell*, 10 A. & E. 453, in the same court, *Thomas v. Cook* was overruled, and the opposite rule was announced. We make the following extract from a note to the case of *Bessig v. Britton*, published in 2 Cent. Law Journal, 296, in reference to the two English cases last cited:

“Passing now to the law as it stands on the other side of the water, it is to be remarked that some of the English judges have, for some time, been casting doubts upon the case of *Green v. Cresswell*, 10 A. & E. 453; for in speaking of the same in *Batson v. King*, 4 H. & N. 739, POLLOCK, C. B., says: ‘I do not think that the case itself was rightly decided.’ Besides a new distinction has been pointed out in the somewhat recent case of *Cripps v. Hartnoll*, 4 Best & S. 414, decided in the Exchequer Chamber, and reversing the judgment rendered in the same case in the Queen’s Bench. ‘But,’ says the same learned baron, in referring to *Green v. Cresswell*, ‘there is a great distinction between that case and the present. Here the bail was given in a criminal proceeding; and, where bail is given in such a proceeding, there is no contract on the part of the person bailed to indemnify the person who became bail for him. There is no debt, and with respect to the person who bails, there is

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hardly a duty ; and it may very well be that the promise to indemnify the bail in a criminal matter should be considered purely as an indemnity, which it has been decided to be.' * * * * 'This view of the subject creates, I think, a broad distinction between the present case and *Green v. Cresswell*, which we are not called upon either to overrule, or to say that we entirely support.' WILLIAMS, J., in the same case, begins his opinion by saying : 'I ought to remark that I do not deem it at all necessary for us to say whether the case of *Green v. Cresswell* is good law or not, but I think there is a distinction between the recognizance of bail in a civil suit and the recognizance given for the appearance of a defendant in a criminal proceeding.' The court rendered judgment for the plaintiff, holding in effect that the promise of the defendant, to indemnify the plaintiff against whatever damage the latter might incur by becoming bail for a third person, was an original undertaking and not collateral, there being no implied promise upon the part of the person bailed to indemnify his bail in a criminal proceeding."

In Alabama and in North and South Carolina and Ohio, the rule laid down in *Green v. Cresswell*, *supra*, has been followed. *Brown v. Adams*, 1 Stew. 51; *Draughan v. Bunting*, 9 Ired. 10; *Simpson v. Nance*, 1 Speers, 4; *Martin v. Black's Ex'rs*, 20 Ala. 309; *Easter v. White*, 11 Ohio St. 219.

In the recent case of *Bessig v. Britton*, *supra*, the Supreme Court of Missouri followed the English rule as laid down in *Green v. Cresswell*, *supra*.

In *Chapin v. Merrill*, 4 Wend. 657, the case of *Thomas v. Cool*, *supra*, was followed. In *Kingsley v. Balcome*, 4 Barb. 131, *Green v. Cresswell* was followed. But in *Barry v. Ransom*, 12 N. Y. 462, *Mallory v. Gillett*, 21 id. 412, and *Konitzky v. Meyer*, 49 id. 571, it was held that where one party, at the request of another, enters into a contract as his surety, the law implies a promise of indemnity; and that an express promise to indemnify is an original undertaking, and need not be in writing. In *Mallory v. Gillett*, *supra*, the ruling in *Kingsley v. Balcome*, *supra*, is expressly disapproved of.

In Massachusetts, Pennsylvania, Iowa, Maine, New Hampshire, Vermont, Maryland, Georgia, Kentucky, Missouri and New Jersey, it has been uniformly held that a promise of indemnity is an original undertaking, and not within the statute of frauds. *Taylor v. Savage*, 12 Mass. 98; *Aldrich v. Ames*, 9 Gray, 76; *Harris v. Brooks*, 21 Pick. 195; *Chapin v. Lapham*, 20 id. 467; *Blake v. Cole*, 22 id. 97; *Hendrick v. Whittemore*, 105 Mass. 23; *Smith v. Sayward*, 5 Greenl. 504; *Holmes v. Knights*, 10 N. H. 175; *Cutter v. Emery*, 37 id. 567; *White*

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house v. Hanson, 42 id. 9; *Hodges v. Hall*, 29 Vt. 209; *Keith v. Goodwin*, 31 id. 268; *Adams v. Flanagan*, 36 id. 400; *Byers v. Mc Clanahan*, 6 Gill & J. 250; *Jones v. Shorter*, 1 Kelly, 294; *Dunn v. West*, 5 B. Mon. 376; *Lucas v. Chamberlain*, 8 id. 276; *Jones v. Letcher*, 13 id. 363; *Melms v. Werdehoff*, 14 Wis. 18; *Apgar's Adm'rs v. Hiler*, 4 Zab. 812; *March v. Consolidation Bank*, 48 Penn. St. 510; *Kelly v. Gillespie*, 12 Iowa, 55.

We next inquire what has been and is now the rule of decision in this State. In *Brush v. Carpenter*, 6 Ind. 78, it was held that an oral promise by one, at whose request another had become replevin bail for a third party, to indemnify such person from loss, was a promise to answer for the debt or default of another, and was within the statute of frauds. The ruling was based upon *Nelson v. Boynton*, 3 Metc. (Mass.) 396; *Kingsley v. Balcome*, 4 Barb. 131, and *Green v. Cresswell*, 10 A. & E. 453. The case of *Nelson v. Boynton*, *supra*, though closely connected with the doctrine underlying the present case, belongs to another class of cases which has arisen under the statute of frauds. There it was held that a promise to pay the note of a third person which is in suit, and is secured by an attachment of his property, in consideration of the holder's discontinuing the suit thereon, is within the statute of frauds, and is not valid unless it be in writing. The case of *Kingsley v. Balcome*, *supra*, has heretofore been explained and shown to have been virtually overruled by the Court of Appeals in that State. It has also been shown that very serious doubts have recently been expressed, in the highest courts in England, as to the correctness of the ruling in *Green v. Cresswell*, *supra*. The ruling in *Brush v. Carpenter* is against the current of American adjudications, and has been, in effect, though not expressly, overruled by the subsequent decisions in this State. It is settled by repeated decisions of this court, that sureties may make any contract they please as between themselves. One surety may thus be exempt from all liability to contribute. Such a contract may be implied from the nature of the transaction, and such extrinsic facts and circumstances as tend to show such to have been the intention of the parties; as, if one surety enters into the original contract at the request of the others, there might as to him be an implied waiver of the right to contribution, and, if compelled to pay the debt, he could recover the whole amount from the other sureties. Such an agreement, whether express or implied, may be shown by parol evidence. *Lacy v. Lofton*, 26 Ind. 324; *Bowser v. Rendell*, 31 id. 128; *Bagott v. Mullen*, 32 id. 332; *Houston v. Bruner*, 39 id. 376; *Core v. Wilson*, 40 id. 204; *Alley v. Gavin*, id. 446; *Schooley v. Fletcher*, 45 id. 86; *Schulz v. Klenk*, 49 id. 212; *Nesbit v. Knowlton*, *ante*, p. 352.

The distinction between original and collateral undertakings has been drawn with great clearness and force in several well-considered decisions rendered by the Supreme Court of the United States, which has manifested a strong inclination not to extend the operation of the statute of frauds, so as to embrace original and distinct promises made by different persons, at the same time, upon the same general consideration. *D' Wolf v. Rabaud*, 1 Peters, 476; *Townsley v. Sumrall*, 2 id. 170; *Emerson v. Slater*, 22 How. 28.

We are very clearly of opinion that the promise of indemnity set up in the portions of the complaint struck out was an original undertaking, and not within the statute of frauds. The appellants signed the note at the request of the appellee Lefever, upon his promise to indemnify them, and we think the promise need not be in writing, but may be proved by parol. It results that the court erred in sustaining the motion to strike out.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the motion to strike out, and for further proceedings in accordance with this opinion.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

BLAESER V. MILWAUKEE MECHANICS' MUTUAL INSURANCE COMPANY, appellants.

(37 Wis. 31.)

Insurance — defense of willful destruction of the property — amount of proof — fraudulent representations.

In an action upon a policy of insurance the insurers set up as a defense that the fire by which the insured property was destroyed originated through the willful act and procurement of the plaintiff. *Held*, that the defendant was not bound to establish the defense beyond a reasonable doubt, but that the jury could determine the issue upon the preponderance of evidence.

In an action on a policy of insurance the defendant set up as a defense fraudulent misrepresentations. *Held*, that the defense was good without an offer to return the premiums.

ACTION upon a policy of insurance upon a flour and grist mill issued to one Tietgen and the plaintiff, but payable to the plaintiff. Defense, that the plaintiff made fraudulent misrepresentations in the application as to the value of the property, and that he willfully caused the fire by which the property was destroyed. The policy provided that in case of misrepresentations or concealments in the application the policy should be void.

Evidence was given tending to establish both defenses. The instructions complained of are given in the opinion. A verdict was rendered for the plaintiff, and the defendant appealed.

Winfield Smith, for appellant.

Foster, Coe & Hedding, for respondent.

COLE, J. It would be a work of considerable labor to notice all the

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exceptions taken to the rulings of the court on the trial of this cause, and we shall not attempt to do so. Our attention will be confined to one or two portions of the charge of the court, which we deem fatally erroneous, and of a character calculated to prejudice the rights of the defendant.

The action was upon a policy of insurance. Among other defenses, the company set up in the answer and relied upon the defense, that the fire by which the insured property was destroyed originated through the willful act and procurement of the plaintiff. In the general charge, and likewise upon the jury coming into court for further directions, the court instructed, in substance, that where the company sets up such a defense to defeat a recovery upon the policy, it should be held to precisely the same rule in respect to the degree or quantity of evidence that would warrant the jury in finding the plaintiff guilty on a trial for the crime of arson; and that, unless they were satisfied beyond a reasonable doubt of the plaintiff's guilt, they must find in his favor upon that issue. This instruction, which imported into the trial of a civil cause the rule applicable to criminal cases, was, we think, erroneous. It required the defense to be established by full proof beyond a reasonable doubt, and directed that no evidence less cogent would justify the jury in finding for the company. It is a familiar doctrine in criminal trials, that the truth of the charge must be established by the prosecution beyond a reasonable doubt, and unless that degree of conviction is produced upon the minds of the jury, it is their duty to acquit the accused. This was a rule originally adopted *in favorem vitæ*, in the days of a severe sanguinary penal code, when the consequences of an erroneous conviction were irreparable. But we see no satisfactory reason for applying the same rule to civil causes, which frequently must be decided upon the preponderance of evidence. It is true there are a few authorities which hold that where the defense to an action involves the proof of a crime, the fact must be established by the same direct positive evidence as though the party implicated were on trial for the criminal offense. But it seems to us the reason and weight of judicial opinion is the other way, and in support of the rule adopted by this court in *Washington Union Ins. Co. v. Wilson*, 7 Wis. 169. It was there held that in an action upon a policy of insurance, where the defense was that the plaintiff willfully set fire to the building insured, the rule of evidence was the same as in other civil cases, and the jury must determine the issue upon the weight or preponderance of evidence. This case was followed in *Wright v. Hardy*, 22 Wis. 348. It is suggested that these cases are in conflict with the subsequent decisions in *Pryce v. Security Ins. Co.*, 29 Wis. 270, and *Freeman v. Free-*

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man, 31 id. 235, and must be considered as overruled. But this is not our understanding of those decisions. In *Pryce v. Security Ins. Co.*, the chief justice, while considering the correctness of an instruction given at the request of the plaintiff as to the degree or quantum of proof required to establish the defense that the plaintiff set fire to the building insured, refers to the rule laid down in *Washington Union Ins. Co. v. Wilson*, and cites rather approvingly some authorities which hold differently, but says that it was immaterial whether the court was right or wrong in giving the instruction, because there was really no evidence to which such a request could apply. It seems to me, however, that the chief justice was mistaken in supposing that Prof. Greenleaf approved the doctrine of those cases which hold that the rule upon this question is the same in civil and criminal cases. In 1 Greenl. Ev., § 65, I understand the learned author to be considering quite a different question, namely, variance between the allegation and proof in criminal prosecutions; while in 3 Greenl. Ev., § 29, the distinction is noted between civil and criminal cases in respect to the degree or quantity of evidence sufficient to justify the jury in deciding the fact in issue. The cases in Maine cited by the chief justice in opposition to the doctrine in 7 Wis. are greatly shaken, if not directly overruled, by *Ellis v. Buzzell*, 60 Me. 209; S. C., 11 Am. Rep. 204. But it seems to us there is nothing in the case in the 29 Wis. which warrants the inference that the court in the decision there made intended to overrule the doctrine of the previous cases on this question. In civil actions it is the duty of the jury to weigh the evidence carefully, and to find for the party in whose favor the evidence preponderates although it be not free from reasonable doubt. 3 Greenl. Ev., § 29; *Wright v. Hardy*, *supra*, 356. *Freeman v. Freeman* was an application for a divorce on the part of the wife on the ground of cruel and inhuman treatment. The husband recriminated, charging the wife with adultery. This court thought that such a charge should not only be sustained by a preponderance of testimony, but should be affirmatively established to the satisfaction of the court beyond a reasonable doubt. And the reason for the rule is given, that the action partakes strongly of the nature of a criminal proceeding, so much so as to make it necessary that the party making the charge of adultery should establish the truth of the fact to a reasonable and moral certainty. But the rule may well be held to apply to an action for a divorce, which is not at all analogous to a case like the one at bar. The former is not unfrequently attended with the most serious and painful consequences; destroying the family; leaving a stain upon the name of innocent offspring; and affecting the property, rights and civil *status* of the parties. It would seem, therefore, em-

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inently proper, in giving judgment which is followed by such results, that the court should proceed with great caution, and require that the charge of adultery be proven by evidence which will "satisfy the human mind, and leave the careful and guarded judgment of the court free from any conscientious and perplexing doubts as to whether the charge be proved or not." But no such rule would seem applicable or called for in an action to recover on a policy of insurance. If the company attempts to defeat a recovery upon the ground that the plaintiff willfully destroyed the property insured, it must of course establish its defense to the satisfaction of the jury; but this may be done by the preponderance of evidence, although it be not free from reasonable doubt.

But the counsel for the plaintiff insists that the company really produced no evidence on the trial which tended to show that the plaintiff set fire to the mill destroyed, and that, consequently, whether the charge we have been considering was right or wrong, it could not possibly have prejudiced the defendant. But this position, we think, is not sustained by the record. There was evidence sufficient to carry the question to the jury, that the plaintiff set fire to the property. We shall not dwell upon it, and it would manifestly be improper for us to express any opinion upon its weight or credibility. These are questions for the consideration of the jury alone. It is said that the testimony, for instance, of Dr. Conrad was improbable and unworthy of credit. However this may be, it is plain that it should have been submitted, with all other circumstances and facts bearing upon the issue, with proper instructions, for the decision of the jury.

There is another portion of the charge excepted to, which we deem it proper and necessary to notice, which is where the court instructed the jury that although there might be misrepresentations in the application, yet the company could not avail itself of them in an action upon the policy, without first tendering back to the insured the amount of premium paid. The learned circuit judge held upon this point that the rule in regard to the rescission of contracts for fraud was applicable; that when a party seeks to avoid a contract on that ground, he must put the other party to the contract back to the condition in which he stood prior to the transaction. This is undoubtedly a well-settled rule in regard to the rescission of contracts; but we think it has no application to the case before us, and for this reason. By the condition of the policy itself, any fraudulent misrepresentations of a fact material to the risk avoids the contract. It is not necessary that the company refund the premium in order to avail itself of this stipulation in the policy. The representations in the application constitute the basis upon which the risk is taken, and the policy declares

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that if there is any misrepresentation or concealment the insurance shall be void and of no effect. The company enters into the contract relying upon the truth of the representations; and if it has been misled or deceived upon matters material to the risk, it may well say that no contract was ever made; that there was no concurrence of assent upon the same facts. In this case the insured declared that the several representations made in the application by way of answer to the questions asked were "*made warranties*," by which he was bound; and we know of no case which holds that if the property is not as warranted, or there are fraudulent representations in a matter material to the risk, the company cannot avail itself of that defense unless it first tender back to the insured the premium paid. In *Campbell v. New England Mutual Life Ins. Co.*, 98 Mass. 381, Justice WELLS says: "Representations to insurers, before or at the time of making a contract, are a presentation of the elements upon which to estimate the risk proposed to be assumed. They are the basis of the contract: its foundation, on the faith of which it is entered into. If wrongly presented in any respect material to the risk, the policy that may be issued thereupon will not take effect. To enforce it would be to apply the insurance to a risk that was never presented." p 390.

These remarks are sufficient to show that the position of the defendant in attempting to defeat the action on the ground that fraudulent representations were made in the application, is essentially different from that held by a party who seeks to rescind a contract on the ground of fraud. The two cases are not to be confounded, as they seem to have been by the court below.

For these errors the judgment of the Circuit Court must be reversed, and a *venire de novo* awarded.

By the Court. — It is so ordered.

GERBER v. ACKLEY, appellant.

(37 Wis. 43.)

Official bond — action on, against surety — for what acts surety liable.

An official bond was conditioned that the principal should "well and faithfully discharge the duties of the office of marshal of said village according to law." The complaint in an action on the bond against the sureties, alleged that the said officer in his official capacity as marshal, "claiming to have a writ of replevin duly issued by

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a justice," wrongfully took from the possession of the plaintiff certain personal property "claiming to act under and by virtue of such writ of replevin," but did not allege that the officer had any writ in fact. *Held*, on demurrer, that the complaint was insufficient, as the act set forth was done *colore officii* and not *virtute officii*, for which acts alone the sureties were responsible.

ACTION on the official bond of one Ludington as marshal of the village of Oconomowoc. The defendant was a surety on said bond. The bond was conditioned that said Ludington would "well and faithfully discharge the duties of marshal of said village according to law."

The complaint alleged that the said Ludington, in his official capacity as marshal, etc., claiming to have a writ of replevin duly issued by a justice of the peace of said county, seized and took the property, etc., as such marshal, claiming to act under and by virtue of such writ of replevin.

The defendant demurred to the amended complaint, as not stating a cause of action, and appealed from an order overruling his demurrer.

Geo. F. Westover, for appellant.

Edwin Hurlbut, for respondent.

COLF, J. The amendment made to the original complaint has not cured the defect pointed out on the former appeal. 32 Wis. 234. It was there stated that the complaint failed to show that Ludington took the property of the plaintiff therein mentioned, officially as marshal, so as to show a breach of the condition of his official bond. The surety is only liable for official acts done or omitted by the marshal; in other words, for those acts done *virtute officii*. A distinction is taken by the authorities between an act done *colore officii* and one done *virtute officii*. See note to *Coupey v. Henley*, 2 Esp. 540; *Seeley v. Birdsall*, 15 Johns. 267; *Morris v. Van Voast*, 19 Wend. 283. "Acts done *virtute officii* are where they are within the authority of the officer, but in doing them he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them." PRATT, J., in *The People v. Schuyler*, 4 N. Y. 187. The surety in the case before us undertook that Ludington should "well and faithfully discharge the duties of the office of marshal of said village according to law," etc. It is an official act, a failure to perform an official duty, or performing it in an improper manner, which comes within the scope of the surety's undertaking. The liability of the surety cannot be extended

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beyond the very terms of the condition of the bond. The act must be an official act, or some default or misconduct as marshal, for which the surety is responsible. *State v. Mann*, 21 Wis. 684. This was the view expressed on the former appeal, when considering the sufficiency of the complaint. Now what is the allegation in the amended complaint upon which the responsibility of the surety is founded? It is in substance that Ludington, in his official capacity as marshal, "*claiming* to have a writ of replevin duly issued by a justice," demanded of and took from the lawful possession of the plaintiff, certain personal property, "*claiming* to act under and by virtue of such writ of replevin." It is not averred that Ludington had a writ of replevin under which he seized the property, so as to give his act an official character. But he "*claimed*" to have process; not that process had been delivered to him which he proceeded to execute in a manner contrary to his official duty. It is sought by the action to make the surety liable for the default or misconduct of Ludington in respect to acts which he was required to perform, or which he did not faithfully discharge as marshal. In order to show that Ludington violated some duty resting upon him as marshal, it must appear that he was acting under process, and not *claiming* to act in the execution of process. If Ludington had a legal writ issued by a justice, which commanded him to seize this identical property, that would afford him full protection, unless he acted wrongfully in executing it. *Griffith v. Smith*, 22 Wis. 646; *Battis v. Hamlin*, id. 669. If he had no such writ, he cannot be said to be acting *virtute officii* and in the discharge of an official duty. The other allegations in the complaint tend to repel rather than support the inference that Ludington demanded and took possession of the property under and by virtue of a writ of replevin fair upon its face. For it is alleged that in the action against him for taking the property, he justified by virtue of an alleged writ, but that the court adjudged that he took it wrongfully. That is, the court adjudged that he had no authority for doing what he did do.

For these reasons we thought before, as we think now, that the complaint fails to show a breach of the condition of Ludington's official bond for which the surety is liable.

By the Court.—The order overruling the demurrer to the complaint is reversed, and the cause is remanded for further proceedings according to law.

McDONALD v. ALLEN.

(37 Wis. 108.)

Sheriff — cannot maintain interpleader as to money in his hands.

A sheriff sold goods seized on execution, and after satisfying the execution had money left in his hands which was claimed by various parties. *Held*, that he could not maintain a bill of interpleader to determine their rights ; but that he should pay the money into court and leave them to apply there.

BILL of interpleader alleging that the plaintiff as sheriff, by virtue of an execution, levied on certain goods and sold them ; that after satisfying the execution there remained in his hands \$1700 ; that the defendants each claimed to be entitled to the money, and praying that they be required to interplead. The defendant Allen demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled and the defendant Allen appealed.

Oarys & Cohtill, for appellant.

Johnson & Rietbrock, for respondents.

COLE, J. We are quite well satisfied that the facts stated in the complaint present no case for a bill of interpleader. The sheriff has another ample remedy, and does not need the aid of the court by a bill of interpleader for his protection. A bill of interpleader is defined by an approved writer on equity jurisprudence as follows : “ A bill of interpleader is a bill filed for the protection of a person from whom several persons claim legally or equitably the same thing, debt or duty ; but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter. The equity is, that the conflicting claimants should litigate the matter amongst themselves without involving the stakeholder in their dispute.” Adams’ Eq. 202. Substantially the same definition is given or adopted in 2 Story’s Eq., §§ 806 and 807 ; Jeremy on Eq. 347 ; Willard’s Eq. 314 ; and *Bedell v. Hoffman*, 2 Paige, 200. The principle on which the jurisdiction is supported, is the danger of injury to the plaintiff from the doubtful titles of the defendants. Mitf. Plead. 49. “ The filing of bills of interpleader ought not to be encouraged, and they should never be brought except in cases where the complain-

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ant can in no other way protect himself from an unjust litigation in which he has no interest." Ch. WALWORTH, in *Bedell v. Hoffman, supra*.

"The true ground," says Mr. Justice STORY, "upon which the plaintiff comes into equity, is, that claiming no right in the subject-matter himself, he is, or may be, vexed by having two legal or other processes, in the names of different persons, going on against him at the same time." 2 Story's Eq. Jur., § 807.

According to these authorities, if the plaintiff could exonerate himself from all liability in respect of the funds in his hands without filing a bill of interpleader, then he should not invoke that remedy. And we have no doubt but that he could do so, and effectually relieve himself from all esponsibility, by paying the money into court, and by making a full return of the facts out of which the controversy in regard to the money arose. The complaint states the nature of this controversy. It is a contest between different creditors of Beekman as to who is entitled to the money in the hands of the sheriff after the Wright execution is satisfied. Allen claims the amount by virtue of his prior judgment and execution, while the subsequent attaching creditors insist that this judgment is fraudulent and void as to them. Now it seems to us the sheriff ought not to be called upon to settle this controversy between these different creditors, and that the proper course for him to pursue is to pay the money into court and make return of the facts, and leave the parties in interest to apply to the court for a determination of the question to whom the money belongs. This course, it seems to us, will afford him full protection. There are most weighty reasons of public policy which forbid that the sheriff should be mixed up in such litigation unless absolutely essential for his protection. He has important duties to perform of an official and public nature, and which he might not be able to properly perform if he has to prosecute suits to settle such conflicting claims. Besides, the officer, if allowed this remedy, would seek to charge the expense of the litigation to the funds in his hands, to the injury and prejudice of creditors having process to which such funds should be applied. And we therefore think that if there was any question as to whom the money belongs to, it was the duty of the sheriff to pay it into court making a return of the facts, and let the court decide upon the conflicting claims of the creditors. This is the practice approved by Mr. Crocker in his work on the Duties of Sheriffs, p. 168, and we deem it the proper one to be adopted. It effectually protects the officer, and relieves him from the necessity of filing bills of interpleader to settle questions which can much better be determined by the court on the application of the creditors in interest.

We will add further, that our views upon the subject may be fully understood, that upon the sheriff's paying the money into court and notifying all parties interested in the controversy of what he has done, he should be deemed to have performed his duty in the premises ; and also that if Allen, upon the facts disclosed in the complaint, had obtained a rule upon the plaintiff to pay the money on his execution, in that case the plaintiff might relieve himself of all responsibility by giving the attaching creditors notice of this rule, and affording them an opportunity to be heard on his return. This course will work no inconvenience or injury to the sheriff, and is one suggested in *Saunders v. Bridges*, 3 Barn. & Ald. 95 ; *Warmell v. Young*, 5 Barn. & Cress. 660, by which the officer may relieve himself from liability. In the absence of all authority we should have been disposed to lay down the same rule as to the duty of the sheriff, but it is a comfort to know that it has the sanction of the court of the King's Bench. It is the best general rule that can be laid down in a case like the one set forth in the complaint, both for the protection of the officer and to secure to creditors a just settlement of their conflicting claims. And it effectually does away with the necessity for filing bills of interpleader by the sheriff, which, if allowed, would inevitably open a wide door to litigation, and in many instances, probably, to favoritism on the part of those officers.

It appears from the complaint that the plaintiff, as sheriff, on the 30th of March, 1874, received two executions issued upon judgments rendered against one Beekman : one in favor of Wright and others, and one in favor of the defendant Allen. The Wright execution had preference by reason of a prior attachment in the suit in which it was rendered. These executions were levied upon certain property of the judgment debtor, which was advertised and sold, April 22. The Wright execution was satisfied, and there remained in the sheriff's hands \$1,710.96. Allen's execution was issued for \$1,589.50. On the 23d of April, the defendant, The Finley Shoe and Leather Company, placed in the sheriff's hands an attachment against Beekman for a debt of \$294.60 ; and the next day the other defendants, the Cadys and Awl, placed in his hands another attachment against Beekman for \$977.13. It is claimed by the learned counsel for Allen, that the sheriff ought, on the day of the sale, viz., the 22d of April, to have satisfied the Allen execution and paid over the money collected thereon, and that he was guilty of a violation of duty and disobeyed the command of his writ by neglecting to do so. We do not, however, think the sheriff was guilty of any negligence in failing to pay over the money to Allen on the day of sale, but he had a reasonable time to do so. On the contrary, as we have indicated, we think it was the

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duty of the sheriff, when the attachments were placed in his hands with the claim on the part of the attaching creditors that the Allen judgment was collusive and fraudulent, entered up for the benefit of Beekman, o have made return of the execution with the facts, and paid the money into court, notifying the parties in interest of what he had done.

The demurrer should have been sustained, on the ground that the complaint does not state facts sufficient to constitute a cause of action.

By the Court.—The order of the Circuit Court overruling the demurrer is reversed, and the cause remanded for further proceedings.

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(87 Wis. 285.)

Partnership — note of non-trading firm — power of one member of a firm of attorneys to make note.

One partner in a non-trading partnership cannot bind his copartner by a bill or note drawn, accepted or indorsed by him in the name of the firm, not even for a debt which the firm owes, unless he have express authority therefor from his copartner, or unless the giving of such instrument is necessary to the carrying on of the firm business, or is usual in similar partnerships; and the burden is upon the holder of the note to prove such authority, necessity or usage.

In an action against the members of a firm of attorneys on a note made by one of them for a firm debt, *held*, that the one not signing the note was not liable in the absence of evidence that he expressly authorized it to be made, or that it was necessary to the carrying on of the firm business, or was usual in similar partnerships.

ACTION on a promissory note. The opinion sufficiently states the case. The court below gave judgment for the defendant Sloan, and plaintiff appealed.

Cassiday & Carpenter, for appellant. When it is shown that the note of a non-trading partnership was given strictly in the business of the firm and for a debt for which the firm is liable, the presumption of liability should arise as in a trading partnership. *Livingston v. Roosevelt*, 4 Johns. 251; *Tappan v. Bailey*, 4 Metc. 529, per SHAW, C. J.; *Freeman v. Carpenter*, 17 Wis. 126; *Garland v. Jacomb*, 6 Moak, 289, 291; *Walden v. Sherburn*, 15 Johns. 422; *Doty v. Bates*, 11 id. 544; *McGregor v. Cleveland*, 5 Wend. 475; Story on Part., §§ 101, 102, 102 a 105, 107, 110, 111, 113, 126, 122 and note, 133; 1 Greenl. Ev., § 112 and note, p. 131; 2 Kent's Com., Lec. 43, pp. 45-48; margin. pp. 42-

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44 ; Collyer on Part., § 384 ; Story on Agency (8th ed.), §§ 37, 39, 124, 125 ; Story on Part., §§ 1, 101, 126 ; 2 Kent's Com., Lec. 43 (11th, ed.), p. 43 ; margin. p. 41 ; 1 Greenl. Ev., § 112 and note, p. 131 . 1 Parsons on Cont. (4th ed.), pp. 174, 175, 177, 184 ; *Wheatcraft v. Hickman* 99 E. C. L. 47, 90, 93, 99, *i. e.*, 9 C. B. R. 47, 90-93, 99 ; *Sage v. Sherman*, 2 Comst. 418, 426 ; *Van Keuren v. Parmelee*, *id.* 423, 525 ; *Griswold v. Haven*, 25 N. Y. 597 ; *Barnard v. L. & P. H. R. R. Co.*, 6 Mich. 277 ; *Hotchin v. Kent*, 8 *id.* 528 ; *Rogers v. Brightman*, 10 Wis. 64 ; *Davis v. Richardson*, 45 Miss. 499.

Bennett & Sale, for respondent.

LYON, J. Had the offered testimony been received, the facts of the case, taken most favorably for the plaintiff, would have been briefly these : Sloan & Patten, the defendants, were partners in the business of practicing law, and as such partners, became indebted to Jackman and Smith, for rent of their law office. During the continuance of their copartnership, Patten, without the knowledge of Sloan, and without any express authority from Sloan, gave a firm note for unpaid rent. The question is, whether Sloan is liable on such note.

The partnership of the defendants was not a trading or commercial one, in which one partner may bind the firm by bill or note drawn or given in the firm name, in all transactions within the apparent scope of the partnership business. The learned counsel for the plaintiff argues, with much ingenuity, that the only difference between trading or commercial partnerships and partnerships in occupation or employment is, that in the former one partner may bind the firm by bill or note in all cases where the same is drawn or given in respect to transactions within the apparent scope of the partnership business, while in the latter one partner can so bind the firm only in actual partnership transactions. Hence he claims that one partner in a non-trading partnership may bind his copartner by bill or note given in settlement of a debt owing by the firm, but concedes that the facts upon which the authority to do so depends, must be averred and proved by the plaintiff, in an action upon a bill or note thus given.

On the other hand, it is argued by Mr. Sloan that no such authority in one of the partners is implied in non-trading partnerships ; and that, although the note in suit was given by Patten during the existence of their copartnership and for a firm debt, still he cannot be held liable upon it, unless it be proved that he gave Patten express authority to execute it, or that it was given in the usual course of the business of the firm.

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If the position of the counsel for plaintiff is correct, the nonsuit was erroneously ordered, and the judgment should be reversed; but if that of Mr. Sloan is correct, the nonsuit was properly granted, and there should be an affirmance of the judgment, unless the non suit was wrong upon other grounds.

The precise question for determination is, Can a partner in a law firm bind his copartner by a note given by him in the name of, and for a debt owing by, the firm, unless he has express authority from such copartner to give the same, or unless it was given in the usual course of the partnership business?

In the opinion by Mr. Justice COLLE in *Freeman v. Carpenter*, 17 Wis. 126 (which was an action against all of the partners on a note given by one of them in the firm name), some observations are found which seem to sustain the position of counsel for the plaintiff. But the case cannot properly be regarded as authority to that extent, because it was there held that borrowing money and giving notes therefor were within the legitimate limits of the partnership business, and hence that all of the partners were liable to a *bona fide* holder thereof, on a note given by one of them in the firm name, but for his individual debt. It became, therefore, quite unnecessary to decide what the result would have been, had it been held that borrowing money and giving notes were not within the scope of the partnership business, and had it appeared that the note was given for a firm debt. Hence, notwithstanding what was said in *Freeman v. Carpenter* (the point not having been adjudicated by this court in any other case), we must regard the question under consideration as an open one in this State, now to be determined upon principle and authority.

The leading cases on the subject in England and in this country have been carefully examined; and a brief review of some of them is warranted by the great importance of the question.

Greenslade v. Dower and Coleman, 7 B. & C. 635, decided by the Court of King's Bench, in 1828, is one of the earliest cases on the subject. It was an action of assumpsit against the defendants as acceptors of several bills of exchange, payable at six and twelve months, drawn by one Willoughby and indorsed by him to the plaintiff. It appeared on the trial that the defendant Coleman purchased of Willoughby the lease of a farm, and also certain stock, crops, fixtures, etc., on the farm, the price to be paid in bills at three months. A written agreement to that effect was entered into by Willoughby and Coleman, and immediately thereafter the defendant Dower became a party to such agreement, with Coleman. Subsequently Dower, without the knowledge or consent of

Coleman, accepted the bills in suit for himself and Coleman for a part of the price of the lease and property thus purchased of Willoughby. It was argued for the plaintiff, that the defendants were partners in carrying on the farm, and, the bills having been accepted for a debt due from the firm, the acceptance by one partner for the firm bound both partners.

It was held that this being a non-trading partnership, Dower had no authority to accept the bills for Coleman, although drawn for a firm debt, and that Coleman was not liable on such acceptance. HOLROYD, J., said: "I am of opinion that the nonsuit was right. Dower had no authority in law to accept these bills for the original purchase of the stock on the farm. The transaction was not a matter of trade, and did not warrant the acceptance without express authority." (p. 639.)

Dickinson v. Valpy, 10 B. & C. 128, decided in 1829 by the same court, was an action wherein the plaintiff, an indorser for value, sought to charge the defendant on a bill of exchange drawn and accepted by the Cornwall & Devonshire Mining Co., by order of its board of directors, in which company the defendant was alleged to be a partner. The purpose for which the bill was drawn and accepted does not distinctly appear; but the case seems to have been decided on the hypothesis that the proceeds of the bill were used in the business of the company.

It was held that, assuming the defendant to have been a partner in the company, it was incumbent on the plaintiff to prove that the directors had authority to bind the other members of the company by drawing and accepting bills of exchange; and that, the plaintiff not having produced the deed of copartnership, nor any evidence tending to prove that it was necessary for the purpose of carrying on the business of the company, or usual for other companies of a similar character, to draw or accept bills of exchange, there was no evidence of such authority to go to the jury. A rule for a nonsuit was made absolute. Lord TENTERDEN, C. J., said: "Assuming that the defendant was proved to be a partner, and not merely to have done certain acts in contemplation of becoming a partner, it was not shown that he, or the other members of that company, had given any authority to a certain part of that company to bind the rest by drawing or accepting bills of exchange. In order to show that, the plaintiff should have gone further, and proved some express authority for that purpose, or facts from which the law would imply such authority. * * In the absence of such proof, I am of the opinion that the mere circumstance of a defendant's having become a shareholder in a mining company does not, in point of law, make him answerable for bills drawn or accepted by those who took upon them-

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selves to manage the concern." BAILEY, J., said : "In order to establish his (the defendant's) liability, it ought to have been made out affirmatively on the part of the plaintiff, that this was a company in which the directors were authorized to bind the other members by drawing and accepting bills. Now upon that point the only question which could be submitted to the jury was, whether companies instituted for similar purposes had constantly been in the habit of drawing and accepting bills or whether it was absolutely necessary, for the purpose of carrying on the concern, that there should have been such a power. There was no evidence to warrant the judge in leaving those questions to the jury." LITTLEDALE, J., said that, even were it necessary to draw bills for the purpose of carrying on a mining concern, "it was incumbent on the plaintiff, in this case, to show, either, from the very nature of this company, that it was necessary, or, from the practice in other similar companies, that it was usual."

Dickinson v. Valpy was approved and followed by the Court of Common Pleas in 1837, in *Bramah v. Roberts*, 3 Bing. N. C. 963 (32 E. C. L. 404).

The case of *Hedley v. Bainbridge*, 3 Ad. & E. (N. S.) 315 (43 E. C. L. 752), decided by the Court of Queen's Bench in 1842, is more directly in point than either of those above mentioned. The action was upon a promissory note given by one of two attorneys in partnership, in the firm name and for a partnership liability. The declaration contained a count on the note, also a count for money lent, and one upon an account stated. The note was for money handed to the firm by a client, for investment. The sum due on the note was specified as the particulars of the plaintiff's demand. Lord DENMAN, C. J., said : "No doubt a debt was due from the firm ; but it does not follow that one partner had authority to give a promissory note for that debt. Partners in trade have authority, as regards third persons, to bind the firm by bills of exchange ; for it is in the usual course of mercantile transactions so to do, and this authority is by the custom and law of merchants, which is part of the general law of the land. But the same reason does not apply to other partnerships. There is no custom or usage that attorneys should be parties to negotiable instruments ; nor is it necessary for the purposes of their business." The plaintiff was nonsuited.

To the same effect is the *nisi prius* case of *Levy v. Pyne & Richards*, tried before Baron ALDERSON in the same year, 1 Car. & Mar. 453 (41 E. C. L. 249), where it was held that, "if a bill of exchange or promissory note be drawn, accepted or indorsed, by one of two persons who are partners in a business which is not a trade (*e. g.*, as attorneys), in the

name of the firm, and the partner who did not write the names of the firm, by his plea, deny the drawing, acceptance or indorsement, respectively. the plaintiff must give evidence of the authority of the other, partner to draw, accept or indorse in the name of the firm; but in the case of a commercial firm this is not necessary, as there is a general authority."

In *Hasleham v. Young*, 5 Ad. & E. (N. S.) 833 (48 E. C. L. 832), decided in 1844, the Court of Queen's Bench applied the doctrine of the above cases to a guaranty given by one of a firm of attorneys in the name of the firm, and held, in an action on such guaranty against the firm, that the plaintiff must show that the same was given in pursuance of the ordinary practice of the parties.

Ricketts v. Bennett, 4 M., G & S. 686 (56 E. C. L. 685), decided by the Court of Common Pleas in 1847, is very similar to *Dickinson v. Valpy*, *supra*.

The last English case to which it is thought necessary to refer is that of *Garland v. Jacomb*, Law Rep., 8 Exch. 218, and 6 Moak, 289, decided in 1873. That was an action against the accommodation acceptor of a bill of exchange, drawn by one of two attorneys in partnership, in the name of the firm, and indorsed by the same partner, in the firm name, to the plaintiff, but for the individual purposes of the partner who drew and indorsed the bill. The other partner knew nothing of the transaction. It was held in the Court of Exchequer, and afterward, on appeal, in the Exchequer Chamber, that such indorsement was invalid, and that an accommodation acceptor was not estopped to deny its validity. The case fully reaffirms the doctrine of *Dickinson v. Valpy*, and *Hedley v. Bainbridge*, *supra*. See, also, Byles on Bills, 32; Collyer on Partnership, § 402; Chitty on Bills, 54; Smith's Mercantile Law, 43.

There seems to be no conflict in the English cases. Judge STORY, in his Commentaries on the Law of Partnerships, lays down the same doctrine, § 102 a. The adjudications in this country, directly upon the subject, are not numerous. The doctrine of STORY and the English courts is affirmed in *Ulery v. Ginrich*, 57 Ill. 531, and in *Hunt v. Chapin*, 6 Lans. (N. Y.) 139; and we do not think it is shaken by any of the cases cited in opposition thereto on behalf of the plaintiff. In most of those cases it seems to have been taken as granted that the partnerships to which they relate were of a commercial or trading character. This is true, we think, of all the New York cases thus cited. *Tappan v. Bailey*, 4 Metc. 529, was an action on a promissory note given by the general agent of a joint-stock lumbering company, in its name, for work done for the company. The court had before it the articles of association,

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which gave the directors (by whom the agent was employed) plenary powers; and there was proof that the agent was authorized to employ laborers for the company, and had frequently given notes for labor, to the knowledge of the directors and without objection. Without deciding whether or not the company was a trading partnership, the court held, upon the evidence, that the members of the company (such company not being incorporated) were liable on the note in suit. This case is not in conflict with the English decisions. The only case cited which seems to hold a different doctrine, is that of *Crosthwait v. Ross*, 1 Humph. (Tenn.) 23. Crosthwait and one Hartwell were partners in the practice of medicine. The latter made a promissory note in the name of the firm, payable to Ross, who indorsed it for the accommodation of the makers. Hartwell then got the note discounted at a bank, converted the proceeds to his own use, and died. Ross took up the note at maturity, and brought his action upon it against Crosthwait. Ross did not know that the proceeds of the note were not to be applied to partnership purposes. It was held that Crosthwait was not liable on the note; and the decision is in entire harmony with all of the authorities. But the court said, hypothetically, that had the note been given for any thing for which a firm of physicians had use, he would have been liable on it. So Crosthwait escaped because the note was given for money instead of medicines, and because money (quoting the language of the court) "is not an article for which such a firm has use, directly." As a proposition of fact, we doubt whether the members of the medical profession will fully indorse the statement of the Tennessee court. We strongly suspect that a firm of practicing physicians has direct use for money, and that the fact would so appear, were members of such firms interrogated on the subject. It is sufficient to say of this case that, whatever there is in the opinion in conflict with the English cases, is purely *obiter dictum*.

We gather from all of the authorities that the distinction between a trading and a non-trading partnership, in respect to the power of a partner to bind his copartner by negotiable instruments, is not limited to a mere presumption of such authority in one case, and the absence of such presumption in the other, as the learned counsel for the plaintiff argued; but we think, and must so hold, that one partner in a non-trading partnership cannot bind his copartner by a bill or note drawn, accepted or indorsed by him in the name of the firm, not even for a debt which the firm owes, unless he have express authority therefor from his copartner, or unless the giving of such instruments is necessary to the carrying on of the firm business, or is usual in similar partnerships; and that the burden is upon the holder of the note who sues upon it, to prove such authority, necessity or usage.

It may be proper to remark in this connection, by way of illustration, that it is probably a usual practice for one partner in a firm of attorneys to draw bills in the firm name upon clients for services and disbursements; also checks upon banks for partnership funds; and perhaps, also, to transfer notes belonging to the firm, by indorsement. In actions involving questions of the validity of such bills, checks or indorsements against the other partners, the party asserting their validity would be bound to establish it in the manner above indicated.

In the present case, there was no attempt to prove that the defendant Sloan authorized his partner to give the note in suit, or that it was necessary in the course of their business, or usual in similar partnerships, for one partner to give promissory notes in the name of the firm. Hence, we conclude that Mr. Sloan is not liable on the note.

Were the action to be treated as one brought to recover the rent for which the note was given, it is plain that the statute of limitations is a complete defense to it; for the rent had accrued September 1, 1865, and the action was not commenced until November 4, 1871 — more than six years thereafter.

But it is said that although Mr. Patten had no authority to bind the firm by this note, still he had authority to bind it by an agreement that the rent should not become due until the expiration of ninety days from September 1, 1865; and that the note, although not binding upon Mr. Sloan as such, is binding upon him as an agreement to postpone the time when the cause of action should accrue. We are unable to concur in this proposition. It is not perceived how the note can be invalid as a note and binding as an agreement. We are of the opinion that, as to Mr. Sloan, the instrument is absolutely void, and that no right of his can be affected by it in any manner whatever. In *Hedley v. Bainbridge*, *supra*, the declaration contained a count on an account stated. That was the proper count upon which to recover the consideration of the note, if the instrument was binding on the firm as an agreement. Yet the plaintiff was nonsuited.

Moreover we think that the complaint in this action is upon the note and that alone. The mere stating therein the consideration of the note does not amount to a count for use and occupation, or on an account stated. But, in the view we have taken of the case, this point is not very material.

By the Court. — The judgment of nonsuit is affirmed.

In re O'Connor.

IN RE O'CONNOR.

(37 Wis. 379.)

Jurisdiction — of State courts over places ceded to the United States.

A State legislature ceded to the United States jurisdiction over certain land, to be occupied as a "Home for Disabled Soldiers" by a corporation organized under act of Congress. *Held*, that the title to the land being in the corporation and not in the United States, it remained subject to the jurisdiction of the State courts.

Scmble, that a State cannot abdicate its jurisdiction over places within its limits, unless the title thereto has been vested in the United States, and that as to such places the jurisdiction of the State to enforce its laws and to punish crime continues until Congress has by some further legislative act extinguished the State authority and vested exclusive jurisdiction in the Federal courts.

CERTIORARI to the County Court of Milwaukee to review proceedings had before the county judge upon the petition of John O'Connor for a writ of *habeas corpus*. The opinion states the case.

N. S. Murphy, for petitioner.

COLE, J. The questions of law to be considered in this case arise upon the following facts, which are stated in the brief of the counsel for the petitioner.

On the 4th day of May, 1874, the petitioner was an inmate of the National Home for Disabled Volunteer Soldiers, near the city of Milwaukee. On the same day, Samuel Hynes and Peter Manning were also inmates of the said National Home, which is located some three miles from the city of Milwaukee, in the town of Wauwatosa. On the 7th day of May, said Hynes made complaint to the Municipal Court of the city and county of Milwaukee, charging the petitioner and said Manning with having committed an assault and battery upon said Hynes, "at the city and county of Milwaukee," on the 4th day of May, 1874, and prayed that the said petitioner and the said Manning might be arrested and punished therefor. On the same day the clerk of said Municipal Court issued a warrant in conformity with the prayer of the complaint, and delivered the same to John F. McDonald, then sheriff of Milwaukee county, for service. On the 25th day of May, 1874, the sheriff, by virtue of said warrant, without making any demand of the commandant of the National Home for Disabled Volunteer Soldiers, or any other person whomsoever, entered upon the grounds occupied by the Home, and arrested and carried away to the city of Milwaukee the petitioner, and thereafter confined him in the common jail of Milwaukee county, awaiting his trial,

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as was supposed, and where he was confined at the time of bringing his petition for a writ of *habeas corpus* before the county judge; and at the time of making said arrest the petitioner was on duty at the Soldiers' Home, by order of the commanding officer thereof. The petition for the writ further represented that no assault or battery or other affray ever occurred between said Hynes, Manning or said O'Connor on said 4th day of May, or at any other time, in the city or county of Milwaukee; but that the same, if at all, occurred on the grounds and within the buildings of said National Home, on the 4th day of May, and not elsewhere, or at any other time, and that for such offense the petitioner had been duly tried and punished by the authorities of the United States at said National Home, pursuant to the rules and discipline legally established for the government of said Home.

The petition further represented that the cause or pretense of his confinement, according to his best knowledge and belief, was the warrant issued by the said Municipal Court, and that such confinement was illegal, as he was advised, and believed, for the following reasons: First, that the petitioner could not be lawfully arrested, while so as aforesaid serving in the said National Home, by authority of a warrant alone, without a demand and information duly presented in writing, under oath, to the commanding officer for his information and decision. Second, because the alleged offense, if any was committed, was not committed in either the city or county of Milwaukee, but on the grounds and within the buildings of said National Home, where said petitioner was only amenable to the rules and articles of war. Third, because the said petitioner had been tried and punished for said alleged offense by the authorities of the said National Home, and that such trial and punishment was a bar to said proceedings in said Municipal Court instituted.

These facts were made to appear by the return of the sheriff to the writ and demurrers interposed thereto, as an inspection of the return of the county judge will more fully show. The county judge, upon the hearing and after argument, held that the warrant to the sheriff, being regular on its face and issued by a court of criminal jurisdiction over such offenses committed in Milwaukee county, was a sufficient protection to the sheriff to enter upon the grounds of the National Home and arrest the petitioner, without a previous demand from the commander of the Home to surrender the prisoner; and he thereupon ordered the petitioner to be remanded to the custody of the sheriff. From this determination of the county judge a writ of *certiorari* was sued out from this court to review the proceedings had before him.

It is quite evident that the only important question arising upon these

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facts is, whether, if the alleged offense was committed on the grounds and within the buildings of the National Home, of which the petitioner was an inmate, the jurisdiction of the Municipal Court extends to it. It is not denied that the jurisdiction of that court is co-extensive with the county of Milwaukee; but it is said that the National Home, the place where the offense was committed, was within the sole and exclusive jurisdiction of the United States, and therefore the Municipal Court can take no cognizance of it. The argument upon this point is briefly this: The grounds, it is insisted, where the National Home is situated, were purchased by Congress, by the consent of the legislature of this State, for a purpose contemplated by the sixteenth clause of the eighth section of the first article of the Constitution of the United States, and therefore, by the very terms of the Constitution, *ipso facto*, they fall within the exclusive legislation of Congress, and the State jurisdiction is completely ousted.

The provision of the Constitution referred to gives Congress the power to exercise exclusive legislation "over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings." On its face this provision would seem clearly to apply to a case where the lands were purchased by the United States, by the consent of the State, for one of the specific and enumerated objects, and where the title to the lands and ownership are in the United States. This is the natural and obvious meaning of the Constitution, and the construction which, in the absence of all authority, we should confidently place upon it. The mode by which, and the purpose for which, land may be acquired or purchased within the limits of a State, by the United States as a sovereign power, are prescribed and pointed out. The purchase is made by the United States, the United States becoming the owner and proprietor of the soil for some purpose indicated in the provision; and this purchase must be ratified or consented to by the legislature, in order to give Congress the exclusive power of legislating over it. When the purchase is made in this manner, and for such an object, then Congress may, if it sees fit to do so, extinguish all State authority and jurisdiction over the place so acquired, and vest exclusive jurisdiction over it in the Federal courts. *United States v. Bevans*, 3 Wheat. 336; *The People v. Godfrey*, 17 Johns. 225; *Commonwealth v. Young*, Brightly's R. 302; *Commonwealth v. Clary*, 8 Mass. 72; *United States v. Cornell*, 2 Mason. 60; *United States v. Davis*, 5 id. 356; 1 Kent, 430; *Mitchell v. Tibbitts*, 17 Pick. 298; *United States v. Travers*, 2 Wheel. Crim. C. 490; *The People v. Lent*, id. 548. But the United States, as a mere proprietor of land situated within the limits of a State, which was acquired by

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purchase, without the consent of the legislature, has no paramount authority derived from ownership of the soil. *United States v. Ames*, 1 Wood. & Minot, 76. "The United States, holding lands within the State territory (unless in the cases specified by the Constitution), hold them by the same tenure that individuals do." DUNCAN, J., in *Commonwealth v. Young*, *supra*, 313. But when the land is purchased by the general government, by the consent of the legislature of the State, for some or one of the purposes mentioned in the Constitution, then doubtless Congress has the power to exercise exclusive legislation and jurisdiction over the place. And even in that case, if Congress has not exercised its exclusive right of legislation over the place, the jurisdiction of the State to support and maintain its laws, and to punish crimes committed within its acknowledged limits will be asserted and maintained. *United States v. Bevans*; *The People v. Godfrey*; *Commonwealth v. Young*; *The People v. Lent*. Unless this were so, the most mischievous consequences would follow in a case where Congress had not accepted the jurisdiction and legislated in reference to the place; since it would leave a portion of the territory within the limits of the State free from the operation of all law, a sanctuary beyond the control of any human tribunal to punish the crimes there committed. Such a condition of things is not to be assumed except upon the clearest grounds. "The rights of sovereignty are never to be taken away by implication." SPENCER, C. J., in *The People v. Godfrey*.

Now, applying these remarks to the facts of this case, we have to inquire whether the purchase was made by the United States, the general government owning the property and taking the title with the consent of the legislature for one or any of the objects mentioned in the Constitution. The nature of the institution or the corporation acquiring the property must be considered. And the first thing that strikes us, on this branch of the case, is, that the purchase was not made by the United States, but by a corporation, which owns and controls the property for the purposes of the trust. It is true, the corporation is one organized and created by an act of Congress, and its board of managers is composed of the President of the United States, Secretary of War and Chief Justice of the United States, *ex officio*, during their terms of office, together with nine other members, who are selected by a joint resolution of Congress from time to time, as vacancies occur. These are constituted and established a body corporate, with certain powers, as a board of managers "of an establishment for the care and relief of the disabled volunteers of the United States army, to be known by the name and style of The National Asylum for Disabled Volunteer Soldiers." 14 U. S.

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Statutes, p. 10. The board of managers have power to procure sites for military asylums at suitable places, and to erect necessary buildings thereon. For the establishment and support of the asylum, certain fines, forfeitures and unclaimed funds in the treasury of the United States are appropriated; and the board is authorized to receive all donations of money or property made by any person for the benefit of the asylum. These are all the provisions of the act which it is necessary to refer to, in order to show the character of the corporation. And it will at once be seen that it is in the nature of a charity or eleemosynary corporation, under the perpetual guardianship of the United States, having power to purchase and hold real estate, and to apply certain moneys for the care, relief and support of discharged volunteer soldiers who served in the late war for the suppression of the rebellion, and were disabled by wounds received or sickness contracted in the line of their duty. The corporation is in its nature and object a public charitable institution, worthy, doubtless, of public favor and of private munificence. It is not, however, to be confounded with the general government; nor are its rights and property in any just, legal sense, the rights and property of the United States. This view would seem to be so obvious as not to require any illustration or remark. The title to the real estate authorized to be purchased belongs to and is the property of the corporation. The corporation only could maintain an action for trespass upon it. If one of the buildings were willfully burnt by any one, an indictment for the arson would necessarily allege the ownership of the property in the corporation. These tests are deemed to be ample and sufficient to show that the lands purchased for the asylum, or National Home, were not acquired by the United States, but by a corporation, and that the provision of the Constitution does not apply to the case. For "the right of exclusive legislation within the territorial limits of any State can be acquired by the United States only in the mode pointed out in the Constitution, by purchase, by consent of the legislature of the State in which the lands shall be, for the erection of forts, magazines, arsenals, dockyards, and other useful buildings." SPENCER, C. J., in *The People v. Godfrey*. "If in any case the United States have not actually purchased, and the State has not, in point of fact, ceded the place or territory to the United States, its jurisdiction remains." 1 Kent, *supra*. True, it appears that the legislature, by ch. 275, P. and L. Laws of 1867, attempted to cede to the United States jurisdiction over the lands upon which the National Home was to be located; but if the United States did not actually acquire these lands as a sovereign power, in the mode and for the purpose authorized by the Constitution, this act of cession by the legislature is void. For it is not

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competent for the legislature to abdicate its jurisdiction over its territory, except where the lands are purchased by the United States, for the specific purposes contemplated by the Constitution. When that is done, the State may cede its jurisdiction over them to the United States; and, should Congress see fit to exercise its exclusive right of legislation over the place, the State jurisdiction would be completely ousted. In that event the State courts could not take cognizance of any offenses committed within the limits of such ceded territory; nor could the inhabitants of such territory exercise any civil or political privileges under the laws of the State, because not bound by those laws. *Commonwealth v. Clary*, *Same v. Young*, 1 Metc. 580.

The view we have taken of the constitutional provision, and of the purchase made by the corporation, is directly in conflict with the decision of the Supreme Court of Ohio, in *Sinks v. Reese*, 19 Ohio St. 306; S. C., 2 Am. Rep. 397. In that case the court held that a purchase of lands through the medium of this corporation for a site for the erection of buildings for the asylum should be regarded precisely in the same light as a purchase by the United States, and that the asylum was under the exclusive jurisdiction of Congress, and that its inmates were not citizens of Ohio, so as to be entitled to vote under the State law. If the court was right in the assumption that the case was the same as though the United States had made the purchase and taken the title, then its conclusion would seem to be irresistible. For, if a resident and citizen of Ohio ceased to be such upon becoming a resident inmate of the asylum, then it would seem plain that he ought not to exercise any civil or political privilege under the laws of the State. But our disagreement with that most able and enlightened court grows out of the fact that it treats a purchase made by the corporation the same as a purchase made by the United States. With all proper respect, it seems to us that a wide distinction exists between the cases. The corporation purchases the land, and owns and controls it as a charity. It is not the property of the United States, and the purchase is not made by and for the general government. The Ohio court say that there could be no reasonable question that Congress had the power under the Constitution of the United States, with the consent of the legislature, to purchase lands for the establishment of such institutions. The power to declare war, and to raise and support armies, carries with it the incidental power to establish asylums for diseased and wounded soldiers; and these asylums, it is observed, differ in no substantial sense from hospitals in a fortress or in the field. All this may be granted. Concede that Congress could have acquired the lands where the National Home is situated, by the consent

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of the legislature of this State, and have established this institution for the care and support of disabled soldiers, and have excluded the State from all jurisdiction over the place and over its inmates. But the question is, Has Congress done this, or attempted to do it? Congress has created a corporation with power to establish, manage and control such a charitable institution. Congress might, with the consent of the State, purchase land for an arsenal, and exercise full and absolute sovereignty over the ceded territory. But, suppose Congress should incorporate a company with power to build and maintain an arsenal for the manufacture and storage of arms and other munitions of war, would the case stand upon the same ground, and would the implication arise that the State had lost jurisdiction over the arsenal belonging to the corporation? "It is a fundamental principle," says C. J. SPENCER, in the remark already quoted, "that the rights of sovereignty are never to be taken away by implication;" and we are not to assume that the State has lost its general jurisdiction over all places within its limits, until that fact is made to appear in a satisfactory manner. For these reasons we are unable to adopt the view of the Supreme Court of Ohio in holding that the inmates of the National Home are subject to the exclusive jurisdiction of another power, and that the Municipal Court of Milwaukee county has no cognizance of an offense alleged to have been committed in that place.

But the counsel for the petitioner furthermore insisted that the question presented was one of personal rather than of territorial jurisdiction. The inmates of the Home, it is said, are made by the act of Congress subject to the rules and articles of war, and are governed thereby in the same manner as if they were in the army of the United States. It seems to me that this does not essentially affect the question we have been considering, which is whether the grounds and buildings of the National Home, the place where the alleged offense was committed, are within the jurisdiction of the State. If the petitioner has been punished by another competent tribunal, this may constitute a good reason why he should not be further prosecuted. But this is obviously a matter of defense. It fails to establish the position that the jurisdiction of the State does not extend to and operate within that territory.

It was also claimed that it was not competent to arrest the petitioner on the warrant without first presenting to the commanding officer a sworn statement of the facts concerning the alleged offense, for his information and decision, and that this is the invariable practice in all such cases. 't might have been an act of courtesy, and a very proper thing for the sheriff to have done, to have informed the commanding officer of the

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charge made against one of the inmates of the institution ; but surely, as it seems to us, this is not a matter which goes to the jurisdiction of the court issuing the process, nor does it affect the duty of the sheriff to execute his writ. In the case of *The People v. Godfrey*, the prisoner and deceased were in the service of the United States when the murder was committed, and the sentence of death was carried into execution. By the 33d article of war, when any commissioned officer or soldier shall be accused of a capital crime, or of having used violence or committed any offense against the person or property of any citizen of the United States such as is punishable by the known laws of the land, it is made the duty of the commanding officer of the regiment or company to which the person so accused shall belong, upon application made by or in behalf of the party injured, to use his utmost endeavors to deliver over such accused person to the civil magistrate, and to aid the officers of justice in apprehending and arresting the person accused, in order to bring him to trial. *Brightly's Digest*, p. 76.

Doubtless the commanding officer of the National Home would have felt the same obligation imposed by this article to co-operate with the civil officers in apprehending and securing the accused petitioner for trial, had a demand been made upon him. To suppose that he would not have been willing to aid in making such arrest, would be to impute to him conduct inconsistent with his duty.

In any aspect in which we have been able to view the case, it seems to us the order of the county judge was correct and must be affirmed.

By the Court. — Order affirmed.

PRINGLE V. DUNN.

(37 Wis. 449.)

Deed — registry of — effect of incomplete record.

A deed or mortgage must be legally recordable and duly recorded according to law, to make the record thereof constructive notice.

The statute required the register of deeds to keep an index, and to enter therein every instrument received for record, and declared that the instrument "shall be considered as recorded at the time so noted." *Held*, that where the instrument as recorded in full appeared defective in some material parts not supplied by the index, the latter did not operate as constructive notice.

The statute required deeds to be witnessed before they were recordable ; the record of a mortgage in the registry failed to show any attestation, though the mortgage itself was in fact duly witnessed, and the attestation was omitted from the record by mistake. *Held*, that a subsequent purchaser of the land was not affected by notice of the mortgage.

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ACTION to foreclose a mortgage executed by the defendant to the L. Crosse & Milwaukee Railroad Company, bearing date April 11 1854, and recorded on that day in the office of the registry of deeds. The plaintiff claimed as a *bona fide* purchaser for value before due. The Milwaukee & St. Paul Railway was made defendant, and in its answer denied that the mortgage was, at or before the recording thereof, witnessed so as to entitle it to record, and alleged that the record showed no subscribing witnesses' names thereon, and also that the said company had since in good faith purchased a portion of the premises covered by the mortgage without any *actual* knowledge of the plaintiff's mortgage.

The evidence was conflicting as to whether the mortgage was duly witnessed when recorded, but it was shown that the record did not show any such attestation.

The court found that the mortgage was not witnessed until after the record, and that the record was not constructive notice, and that the defendants were entitled to judgment, dismissing the complaint. The plaintiff appealed.

Mariner, Smith & Ordway, for appellant.

Guy C. Prentiss, J. P. C. Cottrill and John W. Cary, for respondents.

COLE, J. [After considering the evidence as to whether the mortgage was attested when left for record.] Assuming, then, that the mortgage was witnessed when it was left at the office of the register to be recorded, the further important inquiry arises as to what effect must be given to the record as constructive notice to subsequent *bona fide* purchasers for value. This record was in this State. The entry of the mortgage was made in the general index book, but the full record of the instrument had no subscribing witnesses. And therefore the question is, Would such a record operate as constructive notice to subsequent purchasers for value, independent of any actual notice? It is claimed by the counsel for the plaintiff that the record does and should so operate, notwithstanding the mistake in the registration or recording of the instrument *in extenso*. This presents a question of no little difficulty, which must be solved by the application of general principles of law to the provisions of our statute.

It is a familiar rule, that an instrument must be properly executed and acknowledged so as to entitle it to record, in order to make the registry thereof operate as constructive notice to a subsequent purchaser. Says Mr. Justice STORY: "The doctrine as to the registration of deeds

being constructive notice to all subsequent purchasers, is not to be understood of all deeds and conveyances which may be *de facto* registered, but of such only as are authorized and required by law to be registered, and are duly registered in compliance with law. If they are not authorized or required to be registered, or the registry itself is not in compliance with the law, the act of registration is treated as a mere nullity: and then the subsequent purchaser is affected only by such actual notice as would amount to a fraud." 1 Eq. Jur., § 404. See also *Ely v. Wilcox*, 20 Wis. 528; *Fallass v. Pierce*, 30 id. 444; *Lessee of Heister v. Fortner*, 2 Binn. 40; *Shove v. Larsen*, 22 Wis. 142, and cases cited on p. 146. Under our statute, among other requisites, two witnesses are essential to a conveyance, to entitle it to record. The statute requires every register to keep a general index, each page of which shall be divided into eight columns, with heads to the respective columns as prescribed; and the duty is imposed upon the register to make correct entries in said index of every instrument received by him for record, under the respective and appropriate heads, and immediately to enter in the appropriate column, and in the order of time in which it was received, the day and hour of reception; and it is declared that the instrument "shall be considered as recorded at the time so noted." R. S., ch. 13, §§ 142, 143. In *Shove v. Larsen*, *supra*, the effect of this index containing correct entries of matters required to be made therein was considered. And it was held that by force of the statute it operated as constructive notice to a subsequent purchaser. In that case the index contained an accurate description of the land mortgaged, but in transcribing the mortgage at large upon the records, a mistake was made in the description. And it was claimed in behalf of the subsequent purchaser, that it was the registration of the instrument at large which alone amounted to the constructive notice. But this construction of the statute was not adopted, the court holding that a subsequent purchaser was bound to take notice of the entries in the index, which the law required the register to make. This result seemed to follow necessarily from the language of the statute, which declared that the instrument should be considered as recorded at the time noted. Time might elapse before the instrument was transcribed at large on the record, or it might be lost and not transcribed at all, leaving the index the only record of its contents. And the manifest intention of the statute seemed to be to make the index notice of all proper entries from its date, and also of the instrument itself till it was registered in full. The further consequence would seem necessarily to result from this view of the statute, that the registration of the conveyance *in extenso* relates back to the registration in the index, and from thence there is construct-

ive notice of the contents of the instrument. The doctrine of *Shove v. Larsen* was approved in *Hay v. Hill*, 24 Wis. 235; but the court refused to make the entry in the index in that case operate as constructive notice, because upon its very face it bore conclusive evidence that it was not made at its date. In other words, the rectitude and integrity of the index were successfully impeached by the index itself. See also *International Life Ins. Co. v. Scales*, 27 Wis. 640. Where there is nothing upon the face of the index to impeach or throw suspicion upon its accuracy, there it would affect a subsequent purchaser with notice of those facts which the law required to appear therein. Doubtless a still further consequence follows from this construction of the statute, namely, that where by some mistake there is a discrepancy between the proper index entries and the instruments as registered, there each supplies the defects of the other in the constructive notice thereby given. That is, it appears to be the intention of the statute to charge the subsequent purchaser constructively with such knowledge as the proper index entries afford, as well as with notice of those facts derived from the registration itself. He is presumed to have examined the whole record, and is affected with notice of what it contains. But when the instrument, as registered in full, appears defective in some material and essential parts which are not supplied by the index entries, what effect then must be given the record as constructive notice? This is really the difficult question in this case. From the entries in the index it would not appear whether the mortgage was witnessed or not. The presumption from the mere entries themselves would be, that it was witnessed and acknowledged so as to entitle it to record. But when the mortgage as registered in full was examined, it would be found that it had no witnesses and had no business on the records. As the record itself is only constructive notice of its contents, it is difficult to perceive how it can go beyond the facts appearing upon it, and charge a purchaser constructively with knowledge of a fact not in the record.

One of the counsel for the defendants states the argument on this point as follows: He insists and claims that the entries in the index book, so far as they indicated that the mortgage had been filed for record, indicated also that the mortgage was so executed as to entitle these entries of it to be made; but that when the full record was looked at for all the particulars of the mortgage, and perhaps for the express purpose of verifying the entries in the index, it is found that the apparent assertion by the index entries that the mortgage was properly executed was wholly untrue, and that the mortgage in fact was no incumbrance. The fact, as truly shown to exist by the full record, overcomes and destroys the false assertion as to the fact in the index. And it appearing

by the instrument registered that it was not entitled to record, both the registration and index itself cease to affect the purchaser with constructive notice.

It is not readily perceived wherein this argument as to the effect of our various provisions upon the subject of registration is unsound. The question mainly depends upon the construction of our own statutes. So far as we are aware, this is the first time the point has been presented in this court for adjudication. We have derived but little aid from the decisions in other States, for the reason that few of them have similar statutory provisions. We have been referred by the counsel for the plaintiff to two cases in Michigan, *Brown v. McCormick*, 28 Mich. 215, and *Starkweather v. Martin*, id. 472. In *Brown v. McCormick* the effect of the registry, as notice to subsequent purchasers, was made to turn upon the curative act of 1861, mentioned in the opinion. In *Starkweather v. Martin* the question was, how far the absence, on the registry of a deed, of any mark or device indicating a seal, or of any statement of the register that the original was sealed, affected the validity of the record entry as evidence of title? The record entry of the deed was made more than forty years before the cause was decided, by the proper officer, and in the appropriate place for the registry of deeds, under the law permitting the registry of only sealed instruments; and the instrument was in the form of a warranty deed, purporting to be acknowledged and dated at a time when it was the common and lawful course to seal conveyances, and contrary to official duty to take the acknowledgment unless the conveyance was sealed, and where the conclusion, attestation clause, and certificate of acknowledgment of the instrument all spoke of it as under seal. The court said that these facts and incidents taken together afforded a very strong presumption that the original was sealed.

The doctrine of this case does not seem to have a very strong bearing upon the question under consideration. It may be said that it was contrary to the duty of the register to record the mortgage unless it was properly acknowledged and witnessed, and that a presumption arises that he would not have done so. But in answer to this it may also be said that the law made it the duty of the register to record, or cause to be recorded *correctly*, all instruments authorized by law to be recorded. § 140, ch. 13, R. S. 1858. And the presumption that he performed his duty in recording the mortgage correctly, is as strong as the presumption that he would not have recorded it unless he was entitled to registry.

In *Shore v. Larsen*, a number of cases are referred to which hold that a mistake in recording a deed, or recording it out of its order, renders

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the registration ineffectual as notice to subsequent incumbrancers and purchasers. The doctrine of those cases would seem to be applicable to the case before us. The registration and index entries being incomplete, because showing that the mortgage had no subscribing witnesses, constructive notice could not be presumed of such a record. For the principle "that the registry is notice of the tenor and effect of the instrument recorded, only as it *appears upon that record*," fully applies. *Shepherd v. Burkhalter*, 13 Ga. 443. See, in addition to the cases cited in *Shove v. Larsen*, *Brown v. Kirkman*, 1 Ohio St. 116; *Stevens v. Hampton*, 46 Mo. 404; *Bishop v. Schneider*, id. 472; S. C., 2 Am. Rep. 533; *Terrell v. Andrew Co.*, 44 id. 309; *Frost v. Beekman*, 1 Johns. Ch. 288.

(The remainder of the opinion is not important.)

Cause remanded for further proceedings.

 STROHN V. THE HARTFORD FIRE INSURANCE COMPANY.

(37 Wis. 625.)

Insurance — parol contract — when void for indefiniteness.

A parol agreement of insurance indefinite as to time and rate of premium is incapable of enforcement.

ACTION upon parol agreements to insure. The opinion states the case.

S. A. Hudson & J. B. Cassoday, for appellant.

Sloan & McElroy, for respondents.

COLE, J. The court below nonsuited the plaintiffs upon the ground that, as there was no time fixed for the expiration of the policy or continuance of the risk, no complete contract of insurance was entered into between the parties. The correctness of this view of the case is the main question before us; for, if sustained, it ends the cause.

The complaint states three separate parol agreements for insurance, made by H. N. Comstock for the benefit of himself and the plaintiffs with O. J. Dearborn as agent of the defendant company. These agreements, as set out in the complaint, are explicit and definite as to the amount insured, the continuance of the risk, and the rate of premium to

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be paid. 'And did the proof in regard to the contract come up to and sustain these allegations, there would be no doubt as to the plaintiff's right to recover under the former decision. *Strohn v. The Hartford Ins. Co.*, 33 Wis. 650. But it seems to us that the proof fails to show a valid contract of insurance. The verbal arrangement relied on to show a contract was in substance this :

Comstock, who effected the insurance, if any contract was made, testified that in the spring of 1872 he contemplated establishing a tobacco warehouse for the storage of tobacco, and, when ready to receive it, and when he had received some, he went to Dearborn in relation to insurance. He told Dearborn that he had received some tobacco in his warehouse, and had advertised to receive and store tobacco for other parties, and keep it insured and sell it, or hold it subject to the order of the owners, as the case might be, and that he wanted to effect some insurance. He says that Dearborn told him that an open policy would be best ; the amount perhaps would be increasing or diminishing as time passed along, and he thought it would not be best to issue an ordinary policy of insurance, specifying the amount for a specified time, but that the witness had better have what was called, in insurance parlance, an open policy, allowing the amount to be increased or diminished as witness thought proper. Before the conversation closed, the witness said to Dearborn, " Insure me \$400. * * Insure \$400 on tobacco in my warehouse, belonging to me, and held by me in store for others. * * Finally he said he would give me \$400 insurance in the Hartford in that way. * * Finally he said he would give me \$400 upon any tobacco I had then in the warehouse ; I asked him what per cent ? He said 1 $\frac{3}{4}$. I said, ' All right ; how about the premium being paid ? ' Well, he said he didn't know how much it would be, because we didn't either of us know how long the insurance would continue on that amount ; and he said, ' I will call on you when I want the premium ; you can pay me when I call for it. ' I said ' All right. ' " This is all that was said in regard to the first contract, made on the 23d of April. On the 3d of May, the witness testified that he went to Dearborn, and said to him " that I wanted \$1,500 more insurance on tobacco in the rink or warehouse ; he said, ' Put it in the same open policy as the other ; ' and I said, ' That will be satisfactory to me, with the same premium, yes, sir. ' I asked him if that was all right. He said, ' Yes, make it the same as the other. ' " The conversation in regard to the third agreement was substantially the same as that in respect to the second, except the witness did not remember whether at that interview anything was said about the payment of premium ; but he testified that

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Dearborn said "he would make the entries and issue a policy in proper time, or he would give me a policy; or would make out the papers." In the conversation, when any thing was said about payment of the premium, the witness said that Dearborn told him he would call upon him for it when he wanted it; witness tendered no money, but said he would pay it if Dearborn wanted it. "His excuse was, that he did not know exactly how much to take, and he would not take it just then." And the witness closed his testimony with the statement that "there was nothing said between me and Dearborn as to how long this insurance should run." This is really all the evidence in relation to the several contracts set out in the complaint; and, it seems to us, it fails to show that the negotiations resulted in a valid agreement, or that the parties came to an understanding upon all the material conditions of the contract. The amount of premium to be paid, and the continuance of the risk, are not agreed upon, nor is there any stipulation in the agreement from which these important elements of the contract could be fixed and determined. The rate of premium and continuance of policy are certainly important terms in a contract of insurance. Perhaps a contract which either party could terminate at any time by a notice to the other, might be a valid contract, as intimated by COMSTOCK, J., in *Trustees of the Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305, until the notice was given. However this may be, the general rule is, that to constitute a valid contract of insurance, the minds of the parties must meet as to the premises insured, and the risk; as to the amount insured; as to the time the risk should continue; and as to the premium. Same case in 28 N. Y. 153. Where parties verbally agreed upon all the terms of the insurance except the rate of premium, and a previous insurance was referred to in the conversation, upon the same kind of property in the same place as the property sought to be insured, nothing being said about any change of rate, it was held to be a fair inference of fact that the rate was to be the same as that paid for the previous risk, and that the minds of the parties met upon that amount. *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216. In *Kennebec Co. v. Augusta Ins. Co.*, 6 Gray, 204, where, under an open policy of insurance on property on board a vessel from New Orleans to Boston, the cotton was insured for the voyage, and also, in addition, against fire from the time of its deposit in a warehouse until it was shipped, the objection was taken that the agreement fixed no certain time when the risk was to commence or terminate. But the court held that the risk commenced the day the cotton was first put in store by the plaintiffs at New Orleans, and that the termination of the whole risk, which included both the hazard of fire on shore and the perils of the

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sea on the voyage to be performed, was to be upon the safe arrival of the cotton at Boston, the place of its ultimate destination. In marine insurance, where a cargo is insured for a particular voyage, the policy "to continue on the property until landed" (*Mansur v. New England M. M. Ins. Co.*, 12 Gray, 520), there is no difficulty in determining when the risk terminates. In *Walker v. Metropolitan Ins. Co.*, 56 Me. 371, where the evidence showed an application for a builder's risk, and a permanent yearly risk for a given amount, and that, though no specific premium was agreed upon, yet it was understood that the amount of premium should be deducted from the sum due the plaintiff from the defendants, the court said enough was done to make a complete contract of insurance. But all these cases, and others of the same character which might be cited, are manifestly in their features distinguishable from the one before us. Here Comstock says the rate of premium was to be 1½ per cent; yet this, it is admitted, had reference to the annual rate. But the more serious defect in the contract is, that no time was fixed for the continuance of the risk. Suppose a bill in equity had been filed, as is sometimes done, to specifically enforce the performance of the contract to issue a policy. How could the court determine the essential elements of the contract which it was called upon to enforce? How long was the risk to continue, one month, two months, six months, or a year? All is uncertain and indefinite upon that point. Again, suppose the company had brought an action to recover the premium due on the contract: how much could it have claimed and recovered? It seems to us it is impossible to say. The property was destroyed on the 21st of May, and it is assumed that this was the termination of the risk. But suppose the property had been destroyed a month later, or not destroyed at all, what then would have been its termination? These tests clearly show, as it appears to us, that while the parties negotiated about insurance, still they did not agree upon all the terms, and that no contract was ever completed so as to become binding upon them. For this was a case in which the duration of the risk might and should have been fixed. It was not one where the period was left indefinite, as it is in a voyage policy. It is true, the parties speak of the policy as an "open policy." Precisely what meaning they attached to these words is not readily perceived. Mr. May, in his work on Insurance, defines an open policy to be one in which the sum to be paid as an indemnity, in case of loss, is not fixed, but is left open to be proved by the claimant in case of loss, or is to be determined by the parties. §. 30; Angell on Fire and Life Insurance, § 253. In *Watson v. Swann*, 103 E. C. L. 755, such a policy is spoken of as a "running policy;" but we do not

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understand that such policies leave the duration of the risk indefinite and indeterminable. There are elements by which the continuance of the policy can be ascertained.

The counsel for the plaintiffs insisted that a policy of insurance silent as to the duration of the risk should be placed upon the footing of a promissory note or check upon a bank, which expresses no time for payment, and yet is held payable immediately on demand. But we do not see how that principle can be applied to a contract of insurance. The continuance of the risk is an important element in determining the rate of premium; and how can the company fix its rates when that factor is left entirely indeterminate? A parol contract of insurance, indefinite as to time and indefinite as to rate of premium, is, as appears to us, incapable of enforcement.

This view renders the rulings of the court on the offers made to prove the usage of the company as to open policies, immaterial. If no complete contract of insurance was made, there can of course be no recovery, whatever may have been the practice of the defendant in its insurance with other parties. In this case the parties did not come to an agreement upon all the terms of the contract, and, in order to sustain it as a valid contract, the court must supply conditions and act upon conjectures.

We think the judgment of nonsuit was correct, and must be affirmed.
By the Court. — Judgment affirmed.

THE NORTHWESTERN UNION PACKET COMPANY V. SHAW.

(37 Wis. 655.)

Corporation — ultra vires — contracts of corporations — recovery of money paid under void contract.

Plaintiff, a company incorporated to do business as a common carrier, made a contract with defendant to buy a quantity of grain. *Held*, that the contract was *ultra vires*, and that, therefore, plaintiff could maintain no action for non-delivery of the grain, but that it could recover back the part of the purchase-money already paid.

ACTION to recover damages for breach of a contract and also to recover money paid on the contract. The plaintiff alleged that it was a corporation duly incorporated pursuant to the laws of Iowa and engaged in the business of a common carrier, on the Mississippi river

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and also in buying and selling grain; that it entered into a contract with the defendant to purchase of the latter 4,000 bushels of wheat to be delivered immediately into the barges of the plaintiff, at Lansing, and that plaintiff paid defendant \$1,000 on account thereof; but that defendant refused to deliver the wheat or to return the money so paid and that he also detained and delayed the plaintiff's barge. Judgment was demanded for the money paid on the contract, for damages for breach of contract and for the detention of the barge.

The defendant admitted the contract, the payment of the \$1,000 and the non-delivery, but claimed that the non-delivery was occasioned by the fault of the plaintiff to the defendant's damage.

On the trial the circuit judge held that the plaintiff had no power to make the contract stated and directed a verdict for the defendant. Plaintiff appealed.

Cameron & Losey, for appellant, argued, that, admitting that the contract was void, the company could recover back the money paid upon it. *Chitty on Cont.* 367; *Brown v. Timmany*, 20 Ohio, 81; *Roll v. Raguet*, 4 id. 400; *Greenman v. Curtis*, 6 Mass. 381; *Sampson v. Shaw*, 101 id. 145; *McKee v. Manice*, 11 Cush. 357; *Roscoe on Ev.* 232. The defendant being a party to the contract, and having received its benefits, is estopped from denying the power of the company to make it. *Glass Co. v. Dewey*, 16 Mass. 94; *Welland Canal Co. v. Hathaway*, 8 Wend. 480; *Burns v. R. R. Co.*, 9 Wis. 450. The defendant is precluded from setting up such defense. *Farmers & Millers' Bank v. The Railroad Co.*, 17 id. 372; *Bissell v. R. R. Co.*, 22 N. Y. 258; *Parish v. Wheeler*, id. 494; *Bank v. North*, 4 Johns. Ch. 370; *Navigation Co. v. Weed*, 17 Barb. 378; *State of Indiana v. Woram*, 6 Hill, 37; *Steamboat Co. v. McCutcheon*, 13 Penn. 13; *Palmer v. Lawrence*, 3 Sandf. 170; *Potter v. Bank*, 5 Hill, 490; *Suydam v. Banking Co.*, id. 491; *Bank v. Bank*, 11 Barb. 213. This case is distinguished from *Madison Plankroad Co. v. Watertown Plankroad Co.*, 7 Wis. 59. That suit was brought to enforce the executory contract which was held void. Here the suit is to recover money paid on a contract claimed to be *ultra vires*.

Wing & Prentiss, for respondent, to the point that the contract was *ultra vires*, cited *Perrine v. Canal Co.*, 9 How. (U. S.) 172; *M. Plankroad Co. v. W. Plankroad Co.*, 7 Wis. 59; *Rock River Bank v. Sherwood*, 10 id. 230; *Janesville Bridge Co. v. Stoughton*, 1 Pin. 667; *Angell & Ames on Corp.*, §§ 111, 256. They further argued upon the evidence tending to support the counter-claim, and readiness of defendant

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to perform on his part, that, conceding the contract to be valid, the plaintiff could not recover.

LYON, J. The articles of incorporation of the plaintiff were read in evidence on the trial of the cause, and it appears therefrom that the plaintiff was organized under and by virtue of chapter 52 of the revision of 1860 of the laws of Iowa, entitled "Corporations for pecuniary benefit." The statute was not put in evidence, and we cannot take judicial notice of its provisions. The articles set forth the purposes for which the plaintiff was organized, as follows :

"It is agreed, *first*, that the name of the corporation shall be the 'Northwestern Union Packet Company,' and that the general nature of the business shall be, to purchase, charter, buy, build, own and control vessels to be propelled in whole or in part by steam or otherwise, for the purpose of using them in transportation of persons and property on the Mississippi river and its tributaries ; to erect, purchase, lease, maintain, and own docks, wharves, warehouses and any and all kinds of buildings, structures, or fixtures necessary and useful for carrying on the business of navigation, freighting, forwarding, storing, or transporting property or persons, or for the purpose of building, rebuilding or repairing vessels of any and every kind. And it is agreed, further, that the corporation shall have power to lease, transfer, assign, convey, and sell any and all of its vessels, steamboats, barges, wharves, warehouses, docks, and all of its property of every description, and to do any and all acts and things which may be necessary to an economical and successful prosecution of their said business ; and, amongst other powers not hereinbefore enumerated, it is agreed that it shall have power to borrow money in its corporate capacity and name, and in such capacity to make, execute, and deliver to any person or persons, or body corporate or politic, any and all writings, notes, bonds, mortgages on real estate or personal property, or other security of whatsoever name or kind ; to enter into any arrangement, agreement or contract with any person or persons, association, copartnership, or corporation, in reference to the storing, forwarding or freighting of any kind of property, by this corporation, or to any and all business incidental to or arising from the transportation of persons and property."

No other or further purpose of the organization is stated in the articles, and no other or different business than is mentioned in the foregoing extract is authorized therein.

In determining the legal functions of the plaintiff, the terms of the articles of incorporation must necessarily control ; and unless these specify or by necessary implication include the buying of grain, the contract stated in the pleadings is *ultra vires* on the part of the plaintiff.

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It seems very clear that the articles contemplate that the business of the plaintiff should be confined to that of a common carrier of persons and property. Of course as a common carrier, the plaintiff has power to make all contracts necessary, perhaps convenient to the carrying on of that business. Possibly it might lawfully purchase grain and other produce for storage and shipment, for the purpose of keeping its warehouses and boats employed, which but for such purchase would have been unemployed; although such power, even under such circumstances, may well be doubted. But there is nothing in the pleadings or testimony tending to show that the contract under consideration was made for any such purpose, or that any such contingency had arisen. Hence the question to be determined is, whether the plaintiff can lawfully buy and sell the produce of the country in the same manner and to the same extent that a natural person may.

We think this question must be answered in the negative. There is no necessary connection between the business of a common carrier and that of buying and selling the commodities which the carrier transports. Neither is the latter business necessarily or usually dependent upon the former. The two are as essentially distinct as the business of the carrier and that of the producer. It will scarcely be claimed that the plaintiff is authorized, under its articles of incorporation, to purchase large tracts of land on which to raise grain and other produce to be stored in its warehouses and shipped over its lines. If it may not do this, it is not perceived on what principle it may purchase the commodities instead of raising them. We think the principle is the same in both cases. Moreover, in view of the fact that the transportation of the products of the country is mainly controlled by powerful corporations, representing immense aggregations of capital, there are reasons, if not of public policy, certainly reasons which should have much weight with the legislature, for confining common carriers to their legitimate business as carriers. At least no forced construction of their charters should be sanctioned to enable them to become producers or purchasers of such products. By confining them to the proper business of common carriers, the temptation to make unjust discriminations in the transportation of their own property, to the manifest injury and oppression of persons having like property for transportation, can only be avoided. Hence, while it is conceded that the legislature may confer upon a corporation common carrier the right of a natural person to buy and sell the commodities which it transports it must be held that until so conferred the right does not exist.

We conclude that the contract set forth in the pleadings, as to the plaintiff, is *ultra vires*, and that no claim for damages resulting from a

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breach thereof can be successfully asserted by either party. This disposes of the counter-claim of the defendant, and of all claims of the plaintiff except the claim to recover the \$1,000 paid on account of the attempted purchase of the wheat.

But the question remains whether the plaintiff is entitled to recover the \$1,000. If it can recover it, no good reason is perceived why it may not do so in this action. The complaint states all the facts essential to be averred in an action to recover the same, except that the plaintiff had no power to make the contract, and that omission may be supplied by amendment. Such an amendment cannot prejudice the defendant, for, in the progress of the case thus far, he has constantly asserted such want of power as a defense.

An extended discussion of the question will not be profitable. There are many adjudications in this country and in England, bearing upon it, some of which are cited in the brief of counsel for the plaintiff. The cases have been carefully examined, and we think the rule may fairly be deduced from them, that when money has been paid upon an executory agreement, which is free from moral turpitude, and is not prohibited by positive law, but which is invalid by reason of the legal incapacity of a party thereto, otherwise capable of contracting, to enter into that particular agreement, or for want of compliance with some formal requirement of the law (as that the contract shall be in writing, and the like), the money so paid may, while the agreement remains executory, be recovered back by the party paying it, in an action for money had and received.

Many of the cases go farther, and sustain the action when some of the foregoing conditions are wanting. But the exigencies of this case do not require us to determine how far the rule may be extended, or what conditions may be omitted therefrom without defeating the action. The rule is here stated most favorably for the defendant; and yet it is clear that under it the plaintiff may maintain an action to recover the money, paid on the invalid agreement. A contract to buy wheat is an innocent one; no statute has prohibited it; and this particular agreement is invalid only because of the accident, that the purchaser is a corporation instead of a natural person, and happens to lack authority to make this particular contract.

In addition to the cases on this subject cited by counsel, the following will be found to sustain the views above expressed: *Bagott v. Orr*, 2 Bos. & Pul. 472; *Lowry v. Bourdieu*, Doug. 468; *Aubert v. Walsh*, 3 Taunt. 277; *Busk v. Walsh*, 4 id. 290. In *Thomas v. Sowards*, 25 Wis. 631, the rule above stated was applied. See also *Brandies v. Neustadt*, 13 id. 142. But it is argued by the learned counsel for the defendant, that the

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case of *The M. W. & M. P. R. Co. v. The W. & P. P. R. Co.*, 7 Wis. 50, is an authority fatal to the plaintiff's right to recover. That was a mortgage given to secure the performance of an agreement which the court held to be *ultra vires*. It was as Chief Justice WHITON said in the opinion, an action founded on the agreement and on it alone. The contract failing, the action failed as a matter of course. In strict obedience to the authority of that decision, we hold in this case, that so far as the action is founded on the void agreement, it cannot be maintained. Had that been simply an action to recover the amount paid by the plaintiff for the use of the defendant, it might have been decided differently. But it was not such an action, and the court did not determine whether such an action could be maintained. The case is not, therefore, an authority against the plaintiff's right to recover his advances on account of the void executory agreement.

By the Court.—The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

A motion for rehearing was denied.

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ACCEPTANCE.

See NEGOTIABLE INSTRUMENTS.

ACTION.

1. *Against carrier for failure to carry.*] Plaintiff sent to D. by defendant, an express company, money which he owed D. and which he had agreed to send by express. Defendant failed to deliver it to D., and plaintiff afterward paid D. and brought this action to recover the money sent. *Held*, that plaintiff was the proper party to bring the action. *Southern Express Company v. Craft* (Miss.), 4, and *note*, 12.
2. *When consignor a proper party.*] *Semble*, that an action against a carrier for breach of a contract to carry is well brought by the consignor whether the property was in him or not, because the carrier agreed with him to carry the goods safely, and the action is for a breach of that agreement. *Ib.*
3. *Threats — declaration.*] Declaration that defendant did wrongfully threaten plaintiff with great injury. *Held* too general. *Grimes v. Gates* (Vt.), 129.
4. *What threats actionable.*] Declaration that defendant did threaten to have "plaintiff arrested and imprisoned in the State prison." *Held* sufficient on demurrer. *Ib.*
5. *Against one interfering with estate of deceased person.*] One, who, as the widow's agent, in good faith sells perishable property of the estate of the dead husband and accounts for the proceeds, is not liable to an administrator afterward appointed. *Perkins v. Ladd* (Mass.), 374.
6. *For breach of contract — when it accrues.*] An action for the breach of a written agreement to purchase land brought before the expiration or the time given for the purchase, cannot be maintained by proof of an absolute refusal on the defendant's part ever to purchase. *Daniels v. Newton* (Mass.), 384, and *note*, 394.
7. *Escape of gas through negligence of makers — injury to property.*] The owner of a house cannot maintain an action against a gas-light company for an injury to his reversionary interest, caused by the negligence of the company in permitting gas to escape into the house, if the immediate cause of the injury was the explosion of the gas by the negligence of a tenant in possession of the house. *Bartlett v. Boston Gas-light Co.* (Mass.), 421.

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APPEAL.

Right of prisoner to bail pending.] See BAIL, 32.

ARREST.

*May be made by police officer for felony without warrant.] A police officer has a right to arrest without a warrant, where he has reasonable or probable cause to believe that a felony has been committed, and he will be justified for an assault upon one endeavoring to assist the arrested person in escaping without showing that such person was guilty of the offense charged. *Dering v. State* (Ind.), 669, and *note*, 672.*

ASSAULT AND BATTERY.

1. *Administering "love powder."]* One is guilty of an assault and battery who delivers to another a thing to be eaten (*e. g.*), figs containing "love powders," knowing that it contains a foreign substance and concealing the fact, if the other, in ignorance of the fact, eats it and is injured in health. *Commonwealth v. Stratton* (Mass.), 850, and *note*, 852.
2. *Criminal assault and battery — negligence.]* One who negligently drives over another is not guilty of a criminal assault and battery, although he

does it while violating a city ordinance against fast driving. *Commonwealth v. Adams* (Mass.), 362.

ASSESSMENT.

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ATTACHMENT.

When officer trespasses.] An officer, who attaches goods exempt by law from attachment, is a trespasser. Kiff v. Old Colony & Newport Ry. Co. (Mass.) 429.

Recovery of money extorted by means of.] See DURESS, 867.

Of goods in possession of carrier — effect on carrier's liability.] See CARRIER, 429, 727.

ATTORNEY AND COUNSEL.

Power of attorney to compromise an action.] An attorney at law has no power merely by his retainer as such, to compromise an action and consent to the entry of judgment in accordance with a stipulation, if his client, with the knowledge of the adverse attorney, objects to it, and such objection is brought home to the attention of the court before the judgment is entered. Preston v. Hill (Cal.), 647.

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AUCTION.

1. *Terms of sale — cash payment.] When the terms of a sale by auction require a cash payment, the auctioneer has no authority to receive as payment a check upon a bank in which the drawer has at the time no funds; and the vendor is not bound by the act of the auctioneer, though he omits to notify the vendee that he repudiates it. Broughton v. Sillouay (Mass.), 812.*

2. *Employment of "puffers."] By-bidding or puffing at an auction sale, advertised "to be positive," of land in lots will render the sale voidable by a purchaser influenced by such bidding, whether that bidding was upon the lot purchased by him, or upon lots previously offered, even though such bidding was instigated by the auctioneer without the seller's knowledge; but if it appears that he was not so influenced, the sale is valid. Curtis v. Aspinwall (Mass.), 332.*

3. *Terms of sale — title.] Land, that, without the owner's knowledge, was under attachment, was sold by auction, ten days being "allowed to examine the title, within which time the property must be settled for at the office of the auctioneer." The attachment was not discharged within the ten days, but within that time the purchaser had written to the auctioneer declining "to proceed further in the matter," as he considered "the whole proceeding invalid." In an action against the purchaser for a re-*

fusal to complete the contract, *held*, that, as the vendor was bound to give a good title only upon compliance with the terms of the sale within ten days, the purchaser's letter was a waiver of his right to object to the attachment as an incumbrance. *Ib.*

4. *Damages for failure to complete purchase.*] Land was sold by auction, a sum of money to be paid "on the spot, which will be forfeited to the seller if the terms and conditions are not complied with, but the forfeiture of said money does not release the purchaser from the obligation to take the property." In an action against the purchaser for not taking the property, *held*, that the money paid at the sale should be considered by the jury in reduction of damages. *Ib.*

AUTREFOIS ACQUIT.

See CRIMINAL LAW, 719.

BAIL.

Right to, after conviction.] The constitution provided that "all prisoners shall be bailable upon sufficient sureties." *Held*, that a statute denying bail to a prisoner after conviction, and pending an appeal, was valid. *Ex parte Ezell* (Tex.), 32.

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BAIL BOND.

Blank in.] *See* BOND, 29.

BAILMENT.

1. *Agistment — neglect of agister — recoupment of damage.*] Plaintiff, having agreed to pasture defendant's sheep, turned them into a field separated from a field of S. by an insufficient fence, part of which it was plaintiff's duty to maintain. The sheep escaped into S.'s field, where they became diseased from contact with other sheep. *Held*, in an action of account for the agistment, that plaintiff was guilty of negligence in suffering the sheep to escape, and that defendant could recoup the damage. *Sargent v. Slack* (Vt.), 136, and *note*, 139.

2. *Gratuitous bailees.*] A gratuitous bailee is only liable for gross negligence; he is not bound to any special or extraordinary measures to protect the property, and the negligence with which he can be charged, or which is the proper subject of evidence, is only that which is connected with and directly contributes to the loss. *First Nat. Bank v. Ocean Nat. Bank* (N. Y.), 181.

Liability of national banks as bailees.] *See* BANK, 122, 181.

Of property taken in replevin—loss of. *See* REPLEVIN, 593.

BANK.

1. *Sureties on official bond of cashier released by negligence of directors.*] Defendants became sureties on the official bond of a bank cashier, being induced so to do by a statement published by the directors, according to law, whereby the affairs of the bank appeared to be well managed. The cashier of

the bank was a defaulter when the statement was published, of which fact the directors, by the use of slight care, might have learned. In an action on the bond for subsequent embezzlement, *held*, that the sureties were not liable; they had a right to believe that, before publishing the statement, the directors had used reasonable diligence in ascertaining the condition of the bank, and, being misled by the statement, were not bound. *Graves v. Lebanon National Bank* (Ky.), 50.

2. *Acceptance of bond.*] It is not essential that national banks shall signify their acceptance of the official bonds of their officers in writing. *Ib.*
3. *Special deposits for safe-keeping in national banks.*] The taking of special deposits, to keep merely for the accommodation of the depositor, is not within the authorized business of national banks; and the cashiers of such banks have no power to bind them on any express contract accompanying, or any implied contract arising out of, such taking. *Wiley v. First National Bank* (Vt.), 122.
4. *Liability for deposits for safe-keeping.*] The cashier or other executive officer of a national bank has not, in the absence of special authority from the directors or of a usage or practice so to do, power to receive, on behalf of the bank, property for safe-keeping. *First National Bank v. Ocean National Bank* (N. Y.), 181, and *note*, 192.
5. *Quere* as to the power of a national bank to become a bailee of property either gratuitously or for hire. *Ib.*
6. *Evidence — ultra vires.*] In an action against a bank for the loss of property which it had received as gratuitous bailee, *held*, that the declaration and admissions of the president, tending to show negligence on his part, made after the transaction, and when not acting within the limit of his authority, were not binding upon the bank. *Ib.*
7. *Unauthorized payment of check to agent of payee.*] Plaintiffs, having received the check of a third party payable to their order, indorsed it to the order of the cashier of defendants' bank and, inclosing it in an envelope, sent it to the bank for deposit by a messenger whom they knew to be untrustworthy. The messenger removed the check from the envelope and presented it to the bank for payment, stating that plaintiffs desired the money. The bank gave to the messenger the amount of the check, and he absconded with it. The payment was not in the usual course of business. *Held*, that plaintiffs could recover of the defendants the amount of the check. *Bristol Knife Co. v. First National Bank* (Conn.), 517.

BANKRUPTCY.

1. *Fiduciary debts — claims against attorneys.*] A claim against an attorney for the conversion of his client's money or property is a debt created while acting in a fiduciary character and is not, within the meaning of the bankrupt act, discharged by proceedings in bankruptcy. *Flanagan v. Pearson* (Tex.), 40.
2. *Plea of, as bar to action.*] Action on promissory notes; plea in bar that since the commencement of the action defendant had been adjudged a bankrupt, and that plaintiff had proved its debt in bankruptcy, and that

the bankruptcy proceedings were still pending. *Held* bad on demurrer *The Brandon Manufacturing Co. v. Fraser* (Vt.), 118.

Of firm — note — demand of payment.] See NEGOTIABLE INSTRUMENTS, 207

Of insured — effects change of title within policy.] See INSURANCE, 272.

Of mortgagor — effect on power of sale.] See MORTGAGE, 476.

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See DESCENT, 553.

BETTERMENTS.

Assessments for — property benefited — railroad property.] Assessments for betterments were required by defendants' charter to be made on the property specially benefited. A railroad company was assessed for the paving of a street in front of its passenger station, which paving made access to the station more easy and increased the value of the land for building or other business purposes. *Held*, that the company was not liable to the assessment, as their property was not specially benefited for any purpose for which they could lawfully use it. *N. Y. & N. H. R. Co. v. New Haven* (Conn.), 534.

Lien for, on cemeteries.] See CEMETERIES, 78.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BLANK.

In bond, when will not avoid.] See BOND, 29.

In date of bond, presumption as to.] See BOND, 50.

BOND.

1. *Blank in.*] A bail bond described A B as principal, and was conditioned that whereas an indictment had been found against A B. "Now if the above bounden ——— shall make his personal appearance at the next term," etc., the bond to be void. *Held*, that the bond was good, notwithstanding the blank, and bound A B to appear. *Gorman v. State* (Tex.), 29
2. *Presumption as to date.*] A bond was dated the day of , 1869. *Held*, that the legal presumption was that it did not become binding on the obligors until the last day of that year. *Graves v. Lebanon National Bank* (Ky.), 50.

BURIAL PLACES.

Liens on, for local improvements.] See CEMETERIES, 78.

CARRIER

OF GOODS.

1. *Express company — conditions in receipts.*] Plaintiff delivered to an express company a package for transportation, and received a receipt providing that the company should not be liable for any loss or damage (1) "to any box, package or thing for over fifty dollars, unless the true value thereof is herein stated;" nor (2) "unless the claim therefor shall be made in

writing within thirty days from the accruing of the cause of action." *Held*, (1) that the first condition did not include a loss occasioned by the company's negligence, and (2) that the condition second could not be enforced unless pleaded. *Westcott v. Fargo* (N. Y.), 300.

3. *When attachment of goods will not excuse delivery.*] If goods exempt from attachment are taken from a carrier by an officer, who attaches them as the property of the owner, it is no defense to an action against the carrier by the owner for failure to deliver the goods that they were taken from him against his will and without fraud or collusion on his part, or that he was ignorant of the nature of the goods, and supposed the attachment to be valid. *Kiff v. Old Colony, etc., Ry. Co.* (Mass.) 429.
3. *Liability of, for goods taken from him under legal process.*] A common carrier is excused from liability for not carrying and delivering goods received for carriage, when they are, without his fault, act or connivance, seized and taken from his possession by virtue of legal process. It is necessary, however, for him to give immediate notice to the shipper of such seizure. *Ohio & Mississippi Ry. Co. v. Yohe* (Ind.), 727.
4. *Delivery — railroad — when becomes warehouseman.*] A railroad corporation ceases to be a common carrier and becomes a warehouseman, as matter of law, when it has completed the duty of transportation and assumed the position of warehouseman, as matter of fact and according to the usages and necessities of the business in which it is engaged. *Rice v. Hart* (Mass.), 433.
5. —.] Goods delivered to a railroad corporation, as a common carrier, for transportation, reached the point of destination at half-past three in the afternoon of Saturday, in one of the rear cars of a long freight train, which, on account of its length, was divided into sections, and these were moved up separately to the freight station, and their contents discharged. The consignee's teamster, who was sent for the goods, reached the station at a quarter past four, of the same afternoon, and remained until five, at which time the car containing the goods had not been moved up to the station or discharged. He was told by the agents of the carrier that the goods would not be ready for delivery that day, but that when reached they would be placed in the freight station near the door, where he could get them on the following Monday. The goods were discharged and placed in the freight station on Saturday, but too late for delivery, and the building and its contents were destroyed by fire that night, without any negligence on the part of the railroad corporation. *Held*, that the liability of the railroad corporation as a carrier was ended before the loss of the goods. *Ib.*
6. *Liability for loss of goods by connecting carrier.*] Where a common carrier received goods to be delivered at a point beyond its own line by a connecting carrier, *held*, that such common carrier was liable for a loss of the goods while in the hands of the connecting carrier in the absence of a contract exempting from such liability. *East Tennessee, etc., R. R. Co. v. Rogers* (Tenn.), 589.

OF PASSENGERS.

7. *Liability in unforeseen emergency — unusual flood.*] A common carrier while transporting goods, in case of accident or emergency is not bound to use all the diligence which human sagacity could suggest in protecting such property, but only to use actively and energetically such means as would suggest themselves to, and be within the knowledge and capacity of, well-informed and competent business men in such positions, and such diligence as prudent, skillful men engaged in that kind of business might be expected to use. *Nashville, etc., R. R. Co. v. David* (Tenn.), 594.
8. —.] Accordingly the failure by a railroad company to provide against a flood of unprecedented height, and to take all means to ascertain the coming of such flood whereby goods being transported were lost, provision having been made against a flood equal to the highest previous known rise of water, *held*, not to render the company liable for the loss of the goods. *Ib.*
9. *Obligation to carry and set down at destination — damages.*] Plaintiff entered defendants' cars and paid his fare to B. The train did not stop there, but ran by two miles to a water tank. Plaintiff demanded that the train should return to B, but the conductor gave him the option to ride to the next station and return to B by the first train free of charge, or to leave the train at the tank. He chose the first alternative, and thus reached B after some three hours' delay. Plaintiff sustained no bodily injury, mental suffering, insult, oppression or pecuniary loss. *Held*, that the plaintiff had a cause of action against the defendants for failing to set him down at B, but that he could not recover punitive damages. *Thompson v. N. O., J. & G. N. R. R. Co.* (Miss.) 12.
10. *Liability to master for injury to apprentice.*] A declaration in tort alleged that the defendant was a common carrier of passengers between two places; that the plaintiff's apprentice was on the defendants' car on a day stated, for hire paid by the apprentice in the absence of the master; that, by the defendants' negligence in carrying the apprentice, he was injured, and the plaintiff thereby lost his services. *Held*, on demurrer, that the declaration disclosed a good ground of action. *Ames v. Union Ry. Co.* (Mass.) 426.
11. *Railroad — running behind time — proximate cause.*] A railroad train, running three-quarters of an hour behind time, was upset by a gust of wind and plaintiff was injured. The wind did not extend to that part of the road where the train would have been if running on time. *Held*, that the negligence of the company in running behind time was not the proximate cause of the injury, and that it was not liable therefor. *McClary v. Sioux City, etc., Ry. Co.* (Neb.) 631.
12. *Not liable as innkeeper.*] The owner of a steamship carrying passengers for hire is not an innkeeper, although the passenger pays a round sum for transportation, board and lodging. *Clark v. Burns* (Mass.), 456, and *note* 458.

13. The owner of a steamship is not liable as a common carrier, for a watch worn by a passenger on his person by day and kept by him within reach at night, whether retained upon his person, or placed under his pillow, or in a pocket of his clothing hanging near him. *Ib.*
14. *Question of negligence.*] In an action against a common carrier of passengers for the loss of a watch stolen from the state-room of a passenger in the night time, the case was submitted on agreed facts to the judgment of the Superior Court, which ruled that the plaintiff could not maintain his action, and gave judgment for the defendant. *Held*, that the question, whether upon the facts the inference could be properly drawn that the defendant was guilty of negligence, was not open to the plaintiff upon a bill of exceptions. *Ib.*
15. *Passenger bound by regulations.*] It is the duty of a passenger upon a railway to inform himself beforehand of the regulations of the company for running its trains, and the fact that a ticket for a certain station is sold to him by the company without notice, and that he is permitted to enter the first train leaving thereafter, does not entitle him to require that the train be stopped at such station if it is not in accordance with the regulations for running trains. *Pittsburgh, etc., Ry. Co. v. Nuzum* (Ind.), 703.
- Action against, for failure to carry, by whom brought.*] See ACTION, 4, and note, 12.
- Contracts of, when ultra vires.*] See CORPORATION, 781.

CATTLE.

Liability of owner for acts occasioned by stranger.] When by the wrongful acts of a stranger the cattle of A are driven upon the land of B, the owner of them is not liable to B in an action of tort. *Hartford v. Brady* (Mass.), 377.

CEMETERY.

Lien on, for local improvements—sale of.] Cemeteries or graveyards will not be subjected to sale to satisfy liens on them for improvements of adjacent streets — especially where the disturbance of cemeteries or graveyards is made a penal offense by statute. *Louisville v. Nevin* (Ky.), 78, and note, 79.

CERTIFICATE OF DEPOSIT.

When negotiable — liability of indorser.] See NEGOTIABLE INSTRUMENTS, 176.

CHATTEL MORTGAGE.

Trover by second mortgagee.] A second mortgagee of personal property, who is not in actual possession, cannot maintain an action in the nature of trover for its conversion. *Ring v. Neale* (Mass.), 316.

CHECK.

See BANK.

CITY.

See MUNICIPAL CORPORATIONS.

COLLECTOR.

Of taxes, not obliged to give receipt] See TAXATION.

COMMON CARRIER.

See CARRIER.

CONFLICT OF LAWS.

See TORT, 400.

CONSIGNOR.

When party to action for breach of contract to carry.] See CARRIER, 4.

CONSPIRACY.

To induce one to violate an injunction.] See PATENT, 542.

CONSTITUTIONAL LAW.

1. *Taxation for other than public purposes. Municipal corporation.] A statute authorized towns to issue bonds to raise money "for the purpose of providing the destitute citizens of such townships with provisions and with grain for seed and feed" — the object being to relieve farmers whose crops had been destroyed. Held, unconstitutional, as not being for a public purpose. State v. Osawkee Township (Kan.), 99.*
2. *Game laws — depriving of property without due process of law — regulation of commerce between the States.] A statute imposed a penalty on any person who should have in his possession any dead game at a certain season. In an action for the penalty defendant answered that some of the dead game was in his possession before the passage of the statute and when the killing was not prohibited, and that the remainder was received from another State where the killing was lawful. Held, that a demurrer to the answer was properly sustained. The act was within the power of the legislature and was in violation neither of the constitution of the United States as being a regulation of commerce, nor of the State constitution as being a deprivation of property without due process of law. Phelps v. Racey (N. Y.), 140.*
3. *Appointment of supervisors of election.] A statute directing the justices of this court to appoint supervisors of election is unconstitutional and void, because that duty is not a judicial function. Case of Supervisors of Election (Mass.), 341.*
4. *Local option laws.] A statute authorizing county commissioners to grant licenses for the sale of intoxicating liquors in the several towns, upon a recommendation of the selectmen of the town, and provided that any town might, at its annual meeting, by ballot, prohibit the selectmen from making such recommendations, and forbade the sale of liquors by any one not so licensed. Held, that the statute was constitutional, as it was not a delegation of legislative power to the towns. State v. Wilcox (Conn.), 536.*
5. *Stay law invalid.] An act passed by the legislature of Tennessee, staying judgments and decrees rendered in the courts of that State for twelve*

months, *held*, to be in contravention of the provision of the Federal constitution prohibiting State laws, impairing the obligation of a contract, and void as to previously existing contracts. *Webster v. Rose* (Tenn.), 583.

6. *Remedial statutes — statutes attempting to validate void judgments.*] A statute attempting to validate a judgment void for want of jurisdiction and a sale made under it, *held*, void, (1) as an attempt by the legislature to exercise judicial powers, and (2) as in contravention of the constitutional provision that "no person can be deprived of his property without due process of law." *Pryor v. Downey* (Cal.), 656.

7. *Unconstitutional enactment — liability for acts done under.*] Ministerial officers and other persons are liable for acts done by them under a legislative enactment which is unconstitutional. *Sumner v. Beeler* (Ind.), 718.

Amendment of laws relating to existing contracts.] See INTEREST, 564.

Convening legislature in extra session — revocation of proclamation.] See LEGISLATURE, 634.

Tax on litigation.] See TAXATION, 604, 641.

Validity of statute denying bail after conviction.] See BAIL, 32.

CONTRACT.

1. *Service — breach of action for — damages.*] Plaintiff entered into a contract with defendant to enter defendant's service at a future day. Upon the arrival of the day named, plaintiff tendered performance, but defendant absolutely repudiated the contract. *Held*, (1) a breach of the contract for which plaintiff had an immediate right of action; (2) that the action was one for damages for such breach and not for wages; (3) that it was not necessary for plaintiff, after such breach, to tender service or to keep in readiness to perform. *Howard v. Daly* (N. Y.), 285.
2. —, *evidence.*] In an action against an employer for breach of a contract of service defendant may show, in mitigation of damages, that plaintiff has not used reasonable diligence in securing other employment, and *seem* that the burden of proving that fact is on the defendant. *Ib.*
3. *As to letters patent — statute of frauds — specific performance of oral agreements.*] Plaintiff and defendant entered into an oral agreement whereby a certain invention of defendant, and all letters patent granted therefor, should be their joint property. The plaintiff was to contribute the money to procure letters patent, and both were to use their best efforts to make the invention remunerative. In a suit for specific performance *held*, (1) that the agreement was one of partnership and not void under the statute of frauds relating to the sale of goods, etc.; (2) that it was not void as an agreement not to be performed within one year; (3) that a court of equity had jurisdiction to enforce the contract, although oral, it not being within the statute of frauds and no adequate remedy being attainable in an action at law; (4) that such an agreement, though made before the issue of a patent, is valid and enforceable in equity by compelling an assignment, an accounting and such other relief as the circumstances of the case may require. *Somerby v. Buntin* (Mass.), 459.

Action for breach of, when it accrues.] See ACTION, 384.

Impairing obligation of.] See CONSTITUTIONAL LAW, 583 ; INTEREST, 564.

CONTRACTOR AND CONTRACTEE.

Respondeat superior.] A railroad company let by contract the entire work of constructing its road. The contractor sublet a part of the work. Through the negligence of men employed by the sub-contractor in performing the work, stones and rocks were thrown by a blast upon plaintiff's adjoining property, injuring it. Held, that the railroad company was not liable therefor. McCafferty v. Spuyten Duyvil & Port Morris R. R. Co. (N. Y.) 267.

CONVERSION.

Sale induced by fraud—conversion by innocent purchaser.] A, falsely representing himself to be a member of a firm, bought, in the name of the firm, goods from B, who sent them by a carrier to the firm. On the refusal of the firm to receive them, A sold them to C, to whom they were delivered by the carrier at A's request. Held, that A had no title to the goods, and that an action for their conversion would lie by B, against C, although the latter was a purchaser in good faith. Moody v. Blake (Mass.), 394.

CORPORATION.

1. *Who may be director.] Unless required by statute it is not necessary that a director in a corporation be a stockholder. A person who is not a stockholder in a railroad corporation, but is duly appointed by a city, pursuant to statute, to represent it at the meetings of the stockholders of the railroad corporation and to vote on the stock which it owns therein, may be elected a director of the corporation. Wight v. Springfield & New London R. R. Co. (Mass.) 412.*
2. *Illegal contract—note to trustees.] A promissory note made by a corporation to its trustees is against public policy and void. Wilbur v. Lynde (Cal.), 645.*
3. *Ultra vires—contracts of corporations—recovery of money paid under void contract.] Plaintiff, a company incorporated to do business as a common carrier, made a contract with defendant to buy a quantity of grain. Held, that the contract was ultra vires, and that, therefore, plaintiff could maintain no action for non-delivery of the grain, but that it could recover back the part of the purchase-money already paid. The Northwestern Union Packet Co. v. Shaw (Wis.), 781.*

CRIMINAL LAW.

1. *Indictment—variance—shooting with intent to kill.] An indictment charged that defendant shot M. with intent to kill. The evidence showed that he shot at C. with intent to kill him, missed him and shot M. Held, that the indictment was not good. Barcus v. State (Miss.), 1, and note, 2.*
2. *Indictment—variance—"disorderly house."] Under an indictment at common law for keeping a "disorderly house" it is no variance that defendant kept only a single room. Commonwealth v. Bulman (Mass.), 469.*

3. *Indictment — variance — rape.*] The statute of Indiana defines two classes of rape, one upon a woman against her will, the other upon a female child under twelve years of age. *Held*, that an indictment setting forth an offense of one class could not be sustained by proof of one of the other class. *Greer v. State* (Ind.), 709.
4. *Cumulative sentences.*] Upon conviction of several misdemeanors, of like character, charged in separate counts of the same indictment, the court has no power to impose a sentence or cumulative sentences, exceeding in the aggregate the maximum punishment prescribed by statute for one offense of the character charged. *Tweed's case* (N. Y.), 211.
5. —.] The prisoner was tried on an indictment containing many counts, each charging a different misdemeanor of the same kind. A verdict of guilty, on twelve counts, was returned, and a separate sentence, to the full extent allowed by law for a misdemeanor of the grade charged, was imposed on each count. *Held*, (1) that the sentence for a single offense was good; (2) that the further sentences were in excess of the jurisdiction of the court, and absolutely void, and not merely erroneous; (3) that the prisoner, after the execution of one sentence, was entitled to discharge on *habeas corpus*. *Ib.*
6. *Escape, appeal after.*] A prisoner was convicted of a felony and appealed and afterward escaped. *Held*, that he could not prosecute his appeal. *Wilson v. Commonwealth* (Ky.), 76.
7. *Evidence of witness on former trial since deceased.*] Upon the trial of an indictment the written statement in a bill of exceptions of the testimony of a witness on a former trial of the same case was admitted in evidence against the accused. *Held*, error, the prisoner having a right under the constitution to meet the witnesses face to face. *Kean v. Commonwealth* (Ky.), 63.
8. *Incest — joint offense — indictment.*] By the statute of Indiana against incest, it is provided that "If any step-mother and her step-son shall have sexual intercourse together, having knowledge of their relationship, they shall be deemed guilty," etc. *Held*, that the knowledge of both parties was necessary to constitute the crime, and an indictment charging but one of the parties with having committed the act with knowledge was fatally defective. *Baumer v. State* (Ind.), 691.
9. *Indictment — misnomer.*] When misnomer is pleaded in abatement to an indictment for a misdemeanor, and the fact, upon issue joined, is found against the defendant, he is not, as of right, entitled to plead over. *Commonwealth v. Carr* (Mass.), 345.
10. *Trial — jury of more than twelve men.*] No legal verdict can be rendered in a criminal cause by a jury composed of more than twelve men. If a jury of more than twelve men have been impaneled, and the last juror sworn can be pointed out during the trial, he may be dismissed from the panel and the trial proceed. *Bullard v. State* (Tex.), 30.
11. *False pretenses made in one State and acted upon in another.*] S., who was endeavoring to purchase horses, made, in Indiana, false representations to K. with whom he was dealing as to his means. K. took horses into New

York and, relying upon the representations, delivered them there to S. on credit. *Held*, that S. was not liable in Indiana for false pretenses. *Stewart v. Jessup* (Ind.), 739.

12. *Discharge of jury in defendant's absence.*] Defendant was tried for murder — the jury disagreed, and, in the absence of defendant, were discharged by the court. *Held*, that a further prosecution of defendant was barred. *State v. Wilson* (Ind.), 719.

Administering "love powder."] See ASSAULT AND BATTERY, 350.

Aiding escape — bail.] See ESCAPE.

Arrest without warrant.] See ARREST, 669.

Defendant as witness in his own behalf.] See WITNESS, 346, 673.

Right to bail after conviction.] See BAIL, 32.

See FORGERY, 353.

CRIMINAL TRIAL.

Evidence of non-experts.] See EVIDENCE, 401.

Evidence on trial for adultery.] See EVIDENCE.

Jury of more than twelve men illegal.] See CRIMINAL LAW, 30.

Jury must understand English.] See JURY, 38.

Right of accused to meet witness face to face.] See CRIMINAL LAW, 63.

Right of accused when witness in his own behalf.] See WITNESS, 346.

CUMULATIVE SENTENCE.

Upon conviction for misdemeanors.] See CRIMINAL LAW, 211.

DAMAGES.

1. *In action on covenant of warranty — attorney's fees.*] In an action by a purchaser of land on the vendor's covenant of warranty, the attorney's fees paid by the purchaser in defending the title cannot be allowed as damages. *Turner v. Miller* (Tex.), 47, and *note*, 49.
2. *In action against master.*] If there is wantonness or mischief, causing additional bodily or mental damage, in the injurious act of a servant within the scope of his employment, that wantonness or mischief will enhance the damages as against the master. *Hawes v. Knowles* (Mass.), 383.
3. *In actions for negligence — special damages — professional reputation of plaintiff.*] In an action to recover damages for an injury caused by defendant's negligence, plaintiff claimed damages for being disabled to practice his profession as a physician. *Held*, that defendant might introduce evidence as to his professional reputation and as to the unlawfulness of his practice. *Jacques v. Bridgeport Horse R. R. Co.* (Conn.), 483.
4. *For fraud in exchanging property.*] Plaintiff gave defendant a yoke of oxen for a horse which defendant fraudulently represented to be sound. The horse was really worth more than the oxen, but had he been as represented would have been worth much more. *Held*, in an action for the fraud, that plaintiff was entitled to recover the difference between the

actual value of the horse and its value if sound, and that the question was not affected by the fact that the actual value was greater than that of the oxen. *Murray v. Jennings* (Conn.), 527.

5. *Measure of, to adjacent property by use of street by railroad.*] The measure of damage to adjacent property caused by the use of a street as the site for a railroad is the diminution of the value of the property; and the recovery may include prospective as well as past damages. *Elizabeth, etc., R. R. Co. v. Combs* (Ky.), 67.

For failure to set down passenger at destination.] See CARRIER, 12.

Special, in action for slander.] See SLANDER, 174.

In action for breach of contract for service.] See CONTRACT, 285.

In action against bidder at auction sale for failure to perform.] See AUCTION, 332.

Evidence in mitigation of, in action for seduction.] See SEDUCTION, 331.

For breach of contract of sale.] See SALE, 713.

DAY.

Computation of time.] See TIME, 470.

DEATH.

Proof of, in action for dower.] See EVIDENCE, 144.

DECEIT.

False representations on sale of land.] See FRAUD, 315.

DEED.

1. *By person disseized.*] A deed by a person disseized is valid against every one but the disseizor and his privies. *McMahan v. Bowe* (Mass.), 321.
2. *When heir not bound by covenants of ancestor — estoppel.*] A tenant by the curtesy conveyed the land in fee with full covenants of warranty and afterward died leaving assets equal to the land. *Held*, (1) that his children were not estopped by the deed to assert their title to the land by inheritance from the mother; and (2) that they were not liable to a personal action upon the covenants of the deed unless administration has been taken out and a breach occurs after the estate has been settled. *Russ v. Alpaugh* (Mass.), 464.
3. *Registry of — effect of incomplete record.*] A deed or mortgage must be legally recordable and duly recorded according to law, to make the record thereof constructive notice. *Pringle v. Dunn* (Wis.), 772.
4. —.] The statute required the register of deeds to keep an index, and to enter therein every instrument received for record, and declared that the instrument "shall be considered as recorded at the time so noticed." *Held*, that where the instrument as recorded in full appeared defective in some material parts not supplied by the index, the latter did not operate as constructive notice. *Ib.*
5. —.] The statute required deeds to be witnessed before they were recordable; the record of a mortgage in the registry failed to show any attest-

ation, though the mortgage itself was in fact duly witnessed, and the attestation was omitted from the record by mistake. *Held*, that a subsequent purchaser of the land was not affected by notice of the mortgage. *Ib.*

DELIVERY.

See CARRIER, 433 ; SALE, 318.

DESCENT.

1. *Bastard.*] A bastard in this State has inheritable blood for the purpose of collateral as well as lineal descent through him. *Dickinson's Appeal* (Conn.), 553.
 2. The estate of *A* held to be inheritable by *B* as heir at law, through *C*, his grandmother, a sister of *A*, and *D* his mother, the illegitimate daughter of *C*. *Ib.*
- Of interest in life insurance policy.*] *See* INSURANCE, 530, 722.

DEVIATION.

See INSURANCE, 204.

DEVISE.

To executor in trust.] *See* TRUST, 293.

See WILL.

DIVIDEND.

Title to, upon stock contracted to be sold.] *L.* contracted previous to July 3, to sell shares of stock in a corporation to *B.* at *B.*'s option, to be accepted by July 16. On the last-named day the shares were transferred to *B.* On July 3, a dividend on the stock was declared payable August 1. *Held*, that the dividend belonged to *L.* *Bright v. Lord* (Ind.), 732.

DIVORCE.

Insanity of parties.] The fact that both parties were insane when a petition was filed under Stat. 1873, ch. 371, § 3 (which provides that an absolute divorce may be decreed upon the petition of one divorced *nisi*), is not a conclusive reason for dismissing the petition ; and the fact that the divorce *nisi* was obtained while they were sane does not make it a matter of course, that an absolute divorce should be granted ; and a statement of facts agreed by the guardians does not free the court from its duty to dispose of the cases as public policy and the interests of the parties require. *Garnett v. Garnett* (Mass.), 369, and note, 371.

Validity of decrees granted in another State.] *See* JUDGMENT, 133.

DIRECTOR.

See CORPORATION.

DOG.

See TORT, 400

DURESS.

1. *Of property — payment under.*] A payment by a person to free his goods from an attachment, put on for the purpose of extorting money, by one who knows that he has no cause of action, is a payment under duress, and the money paid can be recovered back in an action for money had and received, without proof of the termination of the suit in which the attachment was made. *Chandler v. Singer* (Mass.), 367.
2. *Threat of imprisonment.*] Plaintiff induced defendant, who was in ill health, to go into a secluded place where he was charged with an offense of which he was not guilty and persuaded that a person who was with and assisted plaintiff, was a police officer, having power to arrest. In consequence of a threat of immediate arrest and imprisonment, defendant executed certain promissory notes. *Held*, such duress as would render the notes voidable. *Bush v. Brown* (Ind.), 695.

ELECTION.

Statute authorizing judges to appoint supervisors of, void.] See CONSTITUTIONAL LAW, 341.

. See OFFICE, 15.

EQUITABLE CONVERSION.

Surplus after mortgage sale real estate.] Land was sold on mortgage foreclosure after the death of the mortgagor. *Held*, that the surplus, after satisfying the debt, was real estate, and that the administrator of the mortgagor could maintain no action to recover it. *Dunning v. Ocean National Bank* (N. Y.), 293.

EQUITY.

Jurisdiction to restrain slander.] See SLANDER OF PROPERTY, 810.

ESCAPE.

Aiding, when not unlawful. Bail — surrender of principal.] A statute provided that if bail desire to surrender their principal they may procure a copy of the recognizance by virtue of which they may take him in any county. The bail of J. L., who was charged with a felony, surrendered him, with his own consent, to the sheriff, but neither they nor the sheriff had any copy of the recognizance or any other written warrant to detain him. *Held*, that the sheriff's custody of J. L. was unlawful, and that aiding him to escape therefrom was no offense. *State v. Beebe* (Kan.), 93.

Suspends right to prosecute appeal.] See CRIMINAL LAW, 76.

ESTOPPEL.

From claiming public office by agreement.] See OFFICE, 15.

When deed of ancestor does not estop heir.] See DEED, 464.

EVICTION.

From part of premises bars rent.] See LANDLORD AND TENANT, 415.

EVIDENCE.

1. *Of death of husband in action for dower.*] In an action for the admeasurement of dower the record of the probate of the will of the plaintiff's husband is not competent evidence of his death. *Carroll v. Carroll* (N. Y.), 144, and *note*, 148.
2. *Price-current list.*] A price-current list published in a newspaper is not evidence *per se* of market value. *Whelan v. Lynch* (N. Y.), 202.
3. *Of intent in criminal trial.*] When the motive of a witness in performing a particular act, or in making a particular declaration, becomes material in a cause, he may himself be sworn in regard to it. *Kerrains v. People* (N. Y.), 158.
4. —.] On the trial of an indictment for assault with a deadly weapon with intent to kill, defendant was asked as to his intent in procuring the weapon. *Held*, competent. *Ib.*
5. *In criminal trial — opinions of non-experts.*] Common observers, having special opportunity for observation, may testify to their opinions as conclusions of fact, although they are not experts, if the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time, and the facts upon which the witness is called to express his opinion are such as men in general are capable of comprehending and understanding. *Commonwealth v. Sturtivant* (Mass.), 401, and *note*, 410.
6. —, *judge to decide as to qualification of witness.*] Whether a witness, not an expert, is qualified to express his opinion as a conclusion of fact, is to be decided by the judge presiding at the trial; and his finding is not open to revision in this court, unless, upon a report of all the evidence, it is shown to be without foundation, or is based on some erroneous application of legal principles. *Ib.*
7. —, *appearance of blood stains.*] On the trial of an indictment for murder, a witness, familiar with blood, who had examined, with a lens, a blood stain on a coat, when it was fresh, and who testified to its appearance at the time he examined it, and that it was not in the same condition at the trial, was permitted to testify that its appearance, when he examined it, indicated the direction from which it came, and that it came from below, upward, although he had never experimented with blood or other fluid in this respect. *Held*, that the admission of the testimony afforded no ground of exception. *Ib.*
8. *Evidence of result of observations.*] At the trial of an indictment for murder, a witness who, soon after the homicide, had taken a pair of shoes from the defendant's house, one of which, as the government contended, fitted a track supposed to have been made by the murderer, was permitted to testify that the shoes appeared as if they had recently been washed. *Held*, that the admission of this testimony afforded no ground of exception. *Ib.*
9. *On indictment for adultery — other acts.*] Upon the trial of an indictment for adultery, evidence of other acts of adultery committed by the same parties, near the time charged, though in another country, is admissible to support the indictment. *Commonwealth v. Nichols* (Mass.), 346.

In criminal trial of witness on former trial since deceased.] See CRIMINAL LAW, 63.

In criminal trial, right of accused as witness.] See WITNESS, 346, 673.

Of declarations of corporate officer when not acting within his authority.] See BANK, 181.

Of repetition of slander.] See SLANDER, 198.

In action for seduction.] See SEDUCTION, 381.

Of negligence—sufficiency.] See NEGLIGENCE, 446.

Of professional reputation in action by physician for damages.] See DAMAGES, 483.

Privileged communications.] See PATENT, 542.

EXECUTOR.

Action against one interfering with estate.] See ACTION, 374.

Delegating by will appointment of.] See WILL, 194.

Devise to, in trust — character of trust.] See TRUSTS, 293.

EXECUTION.

Lien of vendor on sale upon.] See VENDOR AND PURCHASER, 44.

EXEMPTION.

*Agreement to waive invalid.] An executory agreement by a debtor to waive all benefit under exemption laws is against public policy and void. *Meeley v. Ragan* (Ky.), 61.*

EXPRESS COMPANY.

See CARRIER.

FALSE PRETENSES.

Made in one State and acted upon in another.] See CRIMINAL LAW, 720

FIDUCIARY DEBTS.

Claims against attorneys.] See BANKRUPTCY, 40.

FIRE.

Communicated by locomotive.] See NEGLIGENCE, 618.

FIRE INSURANCE.

See INSURANCE.

FOREIGN JUDGMENT.

See JUDGMENT.

FORGERY.

Fraudulent intent — representing signature as that of another.] One who with intent fraudulently to utter a promissory note as the note of a person

other than the signer, procures to it the signature of an innocent party who does not intend thereby to bind himself, is guilty of forgery. *Commonwealth v. Foster* (Mass.), 353.

FRAUD.

- *False representations on sale of land.*] False representations as to the condition, situation and value of real estate, knowingly made by the vendor to the purchaser, are not actionable, unless the purchaser has been fraudulently induced to forbear inquiry as to their truth ; and in such case, the means by which he has been thus induced to forbear inquiry must be specifically set forth in the declaration. *Parker v. Moulton* (Mass.), 815.

Damage for, in exchanging property.] See DAMAGES, 527.

Sale induced by — conversion by innocent purchaser.] See CONVERSION, 894.

See STATUTE OF FRAUDS.

GAME LAWS.

Validity of.] See CONSTITUTIONAL LAW, 140.

GUARANTY.

- To be strictly construed.*] A agreed to furnish B with goods for sale on commission, and C guaranteed that B should account for the proceeds of the sales. The goods were furnished by a firm of which A was a member. *Held*, that the firm could not maintain an action against C on the guaranty without proving that he knew that the goods were to be furnished by them. *Barns v. Barrow* (N. Y.), 247.

GUEST.

See INNKEEPER, 244.

HABEAS CORPUS.

1. *Legislative control of*] The writ of *habeas corpus*, as it was known and used at common law, cannot be abrogated, or its efficiency curtailed by legislative action. *People ex rel. Tweed v. Liscomb* (N. Y.), 211.
2. *When may issue to one held, on final judgment.*] A statute excluded from the benefit of the writ of *habeas corpus* persons "committed or detained by virtue of the final judgment or decrees of any competent tribunal." *Held*, that to debar an applicant from the benefit of the writ the judgment or decree must have been given by a court having jurisdiction to render such judgment. If there was no legal power to render the judgment or decree, there was no competent court, and consequently no judgment or process. *Ib.*

HEIR.

When not estopped by deed of ancestor.] See DEED, 464.

Interest of, in insurance policy for benefit of ancestor.] See INSURANCE, 590, 732.

When bastard is.] See DESCENT, 153.

HIGHWAY

Driving cattle in — liability of owner for injury to adjoining property.] When cattle properly driven upon the highway escape upon unfenced adjoining land, their owner is not liable therefor, if he makes reasonable efforts to remove them and to prevent damage. *Hartford v. Brady* (Mass.), 377.

Action for injuries from defects in.] See SUNDAY, 111, 396.

Location of railroad on — damages.] See RAILROAD, 67.

Railroad over — frightening horses.] See RAILROAD, 364.

IMPEACHMENT.

Of witness.] See WITNESS, 673.

INFANT.

Liability for necessities.] A minor child will not be liable for necessities furnished him, merely because his father is poor and unable himself to pay for them. *Hoyt v. Casey* (Mass.), 371.

See PARENT AND CHILD, 687.

INDICTMENT.

See CRIMINAL LAW.

INDORSER.

See NEGOTIABLE INSTRUMENTS, 176.

INJUNCTION.

Conspiracy to induce one to violate.] See PATENT, 542.

To restrain defamation of property.] See SLANDER OF PROPERTY, 810.

INNKEEPER.

Who is guest.] Plaintiff's stallion stood at defendant's inn certain days each week, under an agreement, made for the season, for serving mares. Plaintiff had the key to the stall and fed and cared for the horse. Defendant furnished the oats for the horse and meals for the plaintiff at a price less than the ordinary rates to travelers. *Held*, that defendant's custody was not that of innkeeper, and that, therefore, he was not liable for the destruction of the barn and horse by fire without negligence on his part. *Mowers v. Fethers* (N. Y.), 244.

INSANITY.

Effect upon proceedings for divorce.] See DIVORCE, 369.

INSURANCE.

FIRE.

1. *Condition in policy — change of title to property — effect of bankruptcy of insured.]* A policy of fire insurance was conditioned to be void if any change should take place "in the title or possession of the property, whether by legal process, or judicial decree, or voluntary transfer." The insured was declared a bankrupt in involuntary proceedings, and his

property was assigned by the register to the assignee in bankruptcy. Afterward the insured property was destroyed by fire. *Held*, that the policy had become void under the condition, and this even though the loss, if any, was, by the terms of the policy, payable to a mortgagee. *Perry v. Lorillard Fire Ins. Co.* (N. Y.) 272.

3. *Defense of willful destruction of the property — amount of proof.*] In an action upon a policy of insurance, the insurers set up as a defense, that the fire by which the insured property was destroyed, originated through the willful act and procurement of the plaintiff. *Held*, that the defendant was not bound to establish the defense beyond a reasonable doubt, but that the jury could determine the issue upon the preponderance of evidence. *Blaeser v. Milwaukee Mechanics' Mut. Ins. Co.* (Wis.) 747.
3. *Fraudulent representations.*] In an action on a policy of insurance, the defendant set up as a defense, fraudulent misrepresentations. *Held*, that the defense was good without an offer to return the premiums. *Id.*
4. *Parol contract — when void for indefiniteness.*] A parol agreement of insurance, indefinite as to time and rate of premium, is incapable of enforcement. *Strohn v. Hartford Fire Ins. Co.* (Wis.) 777.

LIFE.

5. *Fraud of agent in writing answers of applicant.*] The agent of a life insurance company who had authority to receive and forward applications and countersign and deliver policies approved by the company, and to collect premiums, fraudulently put down answers to material questions in the application which were untrue and were not the answers given by the applicant. The applicant signed the application without reading it, and the company issued the policy, which was conditioned that the statements in the application were true. *Held*, that the insurers were not bound by the policy. *Ryan v. World Mutual Life Ins. Co.* (Conn.) 490.
6. *Effect of non-payment of premium by reason of war.*] Where a policy of life insurance is conditioned to be void on the non-payment of the annual premium, a failure to pay such premium, caused by the intervention of war between the territories in which the insurance company and the insured respectively reside, avoids the policy, and it is not revived by a tender, after the war, of the unpaid premiums with interest. *Worthington v. Charter Oak Life Ins. Co.* (Conn.) 495; but see decision of U. S. Sup. Ct. in note, 512.
7. *Notice and proof of death — condition precedent.*] Where a policy of life insurance requires notice and proof of death as a condition precedent to payment, notice alone is not sufficient; and though the insurers, on receipt of such notice, do not call for further proof, they do not thereby waive their right to insist upon it. *O'Reilly v. Guardian Mutual Life Ins. Co.* (N. Y.) 151.
8. *Condition against suicide.*] A life insurance policy contained a clause rendering the same void if the assured "shall die by suicide or by his own hands." *Held*, that the condition referred to the voluntary act of the assured when he was capable of distinguishing right from wrong; but if the act was committed by him when incapable of so distinguishing the

policy would not be avoided. *Phadenhauer v. Germania Life Ins. Co* (Tenn.) 623, and *note*, 622.

9. —.] A condition in a life policy that the policy shall be void if the insured shall die by suicide, sane or insane, avoids the policy in case the insured died by his own hand, notwithstanding he was of unsound mind and wholly conscious of the act. *Bigelow v. The Berkshire Life Ins. Co.* (U. S. Sup. Ct.) *note*, 628.
10. *Payees named in policy take a heritable interest.*] A wife procured a policy of insurance upon the life of her husband, payable to her, if living, if not, to her children. Both she and one of the children died before the husband. *Held*, that a transmissible interest vested in the children upon the issuing of the policy, and that the heirs of the deceased child took, by descent, its interest and were entitled to a portion of the amount assured. *Continental Life Ins. Co. v. Palmer* (Conn.), 530.
11. *Descent of interest in.*] A wife took a policy of insurance upon the life of her husband. She died before her husband. *Held*, that she had such an interest in, and ownership of, the policy and right to the proceeds as would at her death descend to her heirs, notwithstanding the husband was living. *Hutson v. Merrifield* (Ind.), 722.
12. *Action — parties to action on policy.*] When the promise of the assurer in a policy is to the insured, his executors, administrators and assigns to pay him, his executors, administrators or assigns, an action upon it cannot be maintained in the name of one for whose benefit it is expressed to be made. *Bailey v. New England Mutual Life Ins. Co.* (Mass.) 829, and *note*, 831.

MARINE.

13. *Deviation.*] A steamboat was insured for a voyage between two ports, with liberty to "touch and stay at any ports and places, if thereunto obliged by stress of weather or other unavoidable accident." On her voyage she stopped at an intermediate port to repair a defect in her chimney which existed and was known to her owners before she left the port of departure. While thus waiting for repairs she was destroyed by a peril insured against. *Held*, that the stoppage was such a deviation as to avoid the policy, and the insurers were not liable. *Audenreid v. Mercantile Mutual Ins. Co.* (N. Y.) 204.
14. *Parol contract to insure.*] Plaintiff applied to defendant's agent for a policy of marine insurance on certain goods, and paid the premium. The agent said it was not his custom to give a policy, and that it was unnecessary, and gave him a receipt specifying the risk insured, but containing no conditions. *Held*, that the contract was governed by the limitations and conditions contained in the policies ordinarily used by the company. *De Grove v. Metropolitan Ins. Co.* (N. Y.) 305, and *note*, 309. *See supra*, 4.
15. *Authority of agent.*] Per EARL.—An agent of an insurance company has apparent authority to insure in the modes authorized by the company's charter, and upon the terms and conditions inserted in their policies in ordinary use. *Ib.*

16. *Total loss after repairs of partial loss.*] By the general law of marine insurance, independently of any particular clause in the policy or local usage, if a partial loss of a vessel insured is repaired and a total loss afterward happens during the term of the policy, the insurer is liable for the amount of both losses, although it exceeds the amount named in the policy. *Matheson v. Equitable Marine Ins. Co.* (Mass.) 441.

INTENTION.

When evidence of, competent.] See EVIDENCE, 158.

INTEREST.

Agreement to pay after maturity—subsequent amendment of statute relating to—constitutional law.] A statute provided that the parties to a loan could contract for any rate of interest. Plaintiff made a loan to defendant, the latter agreeing to pay "interest, at the rate of fifteen per cent after maturity." Before maturity the statute was amended so as to provide that only seven per cent should be recovered for money lent, after maturity. *Held*, (1) that the fifteen per cent was not a penalty for the breach of the contract, but interest due under it; (2) that if the amendment was intended to apply to such contracts then in existence, it was unconstitutional and void as impairing the obligations of contracts. *Hubbard v. Callahan* (Conn.), 564.

Effect of repeal of usury law on existing defense.] See USURY, 81.

INTERPLEADER.

Sheriff cannot maintain.] See SHERIFF, 754.

JOINT-TRESPASSERS.

Judgment and execution against.] The injured party may sue several joint trespassers separately, and prosecute each suit to final judgment. He cannot, however, have separate executions, but must elect, and the issue of an execution against one discharges the others. *Fleming v. McDonald* (Ind.), 711.

JUDGES.

Statute directing, to appoint supervisors of election void.] See CONSTITUTIONAL LAW, 841.

JUDGMENT.

1. *Foreign judgment—ex parte judgment for alimony—divorce.*] Parties were married in New York and afterward removed to Vermont where the husband left the wife. Thereupon she returned to New York, and there obtained a decree for divorce and alimony for the husband's adultery in Vermont, after notice by publication and by mailing a copy of the summons and complaint to the town in Vermont where he had last lived with his wife, but from which he had afterward removed. The husband did not appear in the suit. *Held*, in an action of debt on the decree for alimony, that the decree was not binding on the defendant in Vermont. *Prosser v. Warner* (Vt.). 182.

- 3 ——.] *Semble*, that the decree of divorce was not. *Ib.*
2. *Action on, in another State — when appeal no bar.*] If, by the law of a State where a judgment is obtained, an appeal does not stay proceedings on the judgment in that State, the pendency of such an appeal is no bar to an action on the judgment in this Commonwealth. *Faber v. Hovey* (Mass.), 398.
- Review of, on habeas corpus.*] See HABEAS CORPUS, 211.
- Making valid by special statute.*] See CONSTITUTIONAL LAW, 656.

JURISDICTION.

1. *Of State courts over offenses against Federal currency.*] The power to punish for offenses against the Federal currency is not granted exclusively to the United States, and the courts of Indiana have, under the law of that State, jurisdiction to convict of the crime of knowingly having in possession apparatus made use of for counterfeiting United States coin. *Snoddy v. Howard* (Ind.), 738.
2. *Of State courts over places ceded to the United States.*] A State legislature ceded to the United States jurisdiction over certain land, to be occupied as a "Home for Disabled Soldiers," by a corporation organized under act of congress. *Held*, that the title to the land being in the corporation and not in the United States, it remained subject to the jurisdiction of the State courts. *In re O'Connor* (Wis.), 765.
3. ——.] *Semble*, that a State cannot abdicate its jurisdiction over places within its limits, unless the title thereto has been vested in the United States, and that as to such places the jurisdiction of the State to enforce its laws and to punish crime continues until Congress has, by some further legislative act, extinguished the State authority, and vested exclusive jurisdiction in the Federal courts. *Ib.*
- In action for divorce.*] See JUDGMENT, 132.
- Of equity in cases of libel and slander.*] See SLANDER OF PROPERTY, 310.
- To enforce oral contract.*] See CONTRACT, 459.

JURY.

- Must understand English.*] Jurors who did not understand English were impaneled for the trial of a criminal case. *Held*, error. *Lyles v. State* (Tex.) 38.
- In criminal trial — panel of more than twelve illegal.*] See CRIMINAL LAW, 80.
- Discharge of, in defendant's absence.*] See CRIMINAL LAW, 719.

LANDLORD AND TENANT.

1. *Liability of landlord for leasing infected premises.*] A landlord who leases premises, knowing they are infected by a contagious disease, without notifying the tenant thereof, is liable to the latter for the damages sustained, in case the disease is communicated. *Cesar v. Karutz* (N. J.) 164.

2. *Eviction from part of premises bars action for rent.*] Eviction of a tenant by a landlord from a part of the leased premises suspends the entire rent so long as the eviction continues; and the effect is the same whether the lease be oral or written. *Colburn v. Morrill* (Mass.), 415.
3. *Surrender of lease by operation of law.*] The general agent of the owner of real estate leased it to defendant by a lease under seal; defendant sub-let it to M., and the agent thereupon agreed to look to M. for the rent and to accept a surrender of defendant's lease; defendant gave him the lease and took a receipt therefor. *Held*, in an action against defendant for the rent, (1) that the agent had an implied power to accept a surrender; and (2) that the facts amounted to a surrender by operation of law. *Amory v. Kannoffsky* (Mass.), 416.
4. *When employee occupies as servant and when as tenant.*] Where the occupancy of the employer's house by the employee is connected with the service, or is required for the necessary or better performance of the service, the employee holds as a servant and the possession is in the master; but where the occupancy is exclusive, and independent of, and in no way connected with, the service, the holding is as a tenant. *Kerrains v. People* (N. Y.), 158.
5. —.] A employed B to work in his mill, agreeing to pay him certain wages per day and to give him the use of a house which was part of the mill property, and which had before been occupied by B while working in the mill. *Held*, that B held the house as a servant and not as a tenant. *Ib.*

Action by landlord against stranger for injury to lease property — contributory negligence of tenant.] See ACTION, 421.

LEASE.

To one partner when for partnership benefit.] See PARTNERSHIP, 203.

See LANDLORD AND TENANT.

LEGISLATURE.

Convening in extra session — revocation of proclamation.] The governor of a State being temporarily absent therefrom, the person upon whom the constitution devolved the duties of that office in such case, issued a proclamation convening the legislature in extraordinary session. The governor, returning before the day named for the session, revoked the proclamation. *Held*, that such revocation was lawful, and that any act done by the legislature assembled under the proclamation was void. *People v. Parker* (Neb.), 634.

LETTERS.

Presumption as to their receipt.] Where a letter is properly directed and posted to a party, or is deposited in a place used by him for such purpose—*e. g.*, the letter-box at his place of business—the presumption is that he received it, and his denial of the receipt simply raises a question of fact. *Howard v. Daly* (N. Y.), 285.

LIEN.

Of vendor after sale on execution.] See VENDOR AND PURCHASER.

LIFE INSURANCE.

See INSURANCE.

LIQUOR LAWS.

Local option laws.] See CONSTITUTIONAL LAW, 536.

LOCAL IMPROVEMENTS.

Sale of cemetery under lien for.] See CEMETERY, 78.

See BETTERMENTS.

LOCAL OPTION.

See CONSTITUTIONAL LAWS, 536.

LORD'S DAY.

See SUNDAY.

MALICIOUS PROSECUTION.

When probable cause no defense.] It is no defense to an action for malicious prosecution that there was probable cause for supposing that plaintiff was guilty of the crime for which he was prosecuted, if defendant did not at the time know of the facts constituting the probable cause. Galloway v. Stewart (Ind.), 677.

MARINE INSURANCE.

See INSURANCE.

MARRIAGE.

Evidence as to plaintiff's marriage in action for seduction of daughter.] See SEDUCTION, 381.

MASTER AND SERVANT.

When servant occupies master's house as tenant.] See LANDLORD AND TENANT 158.

Damages in action against master for act of servant.] See DAMAGES, 383.

Action for injury to servant.] See CARRIER, 426.

See CONTRACTOR AND CONTRACTEE.

MISTAKE OF LAW.

Purchaser of securities presumed to know as to their validity.] See SALE, 655.

MORTGAGE.

1. *Power of sale — purchase by mortgagee.] A mortgagee selling under a power of sale in the mortgage may, if its terms authorize him so to do, be the purchaser at the sale, and make the deed in his own name directly to himself. Hall v. Blinn (Mass.), 476.*

2. *Bankruptcy of mortgagor.*] A mortgagee sold the mortgaged premises under a power of sale in the mortgage, which empowered him, upon breach of condition, to sell the premises and convey the same, in his own name or as the attorney of the mortgagor, by proper deeds to the purchaser absolutely and in fee simple, and provided that the mortgagee, or any person in his behalf, might purchase at the sale. The deed was made by the mortgagee, both in his own name and as attorney of the mortgagor, directly to himself. *Held*, that the power was properly executed, that the deed conveyed a valid title to the mortgagee, and that the fact of the mortgagor's bankruptcy prior to the sale did not affect the authority of the mortgagee to execute the deed in his name and as his attorney. *Ib.*
3. *Given to secure note — right of indorsee of note.*] The *bona fide* purchaser for value of a negotiable note secured by mortgage, before maturity and without notice, takes the mortgage as he does the note, discharged of all equities between the original parties. *Webb v. Hoselton* (Neb.), 638.
- Condition as to payment — tender — place of payment.*] See PAYMENT, 168.
- Sale under — when surplus real estate.*] See EQUITABLE CONVERSION, 293.
- Of personal property.*] See CHATTEL MORTGAGE, 316.
- Verbal promise to alter invalid.*] See STATUTE OF FRAUDS, 679.

MUNICIPAL CORPORATION.

1. *When may indemnify its officers.*] A municipal corporation may legally indemnify an officer, acting in good faith, for a loss incurred in the discharge of his official duty ; but the duty must have been one authorized or imposed by law, and the matter one in which the corporation had an interest. *Gregory v. Bridgeport* (Conn.), 485.
2. —.] An officer was appointed by a city to execute a by-law relating to wharves and the mooring of vessels. His duty was simply to regulate differences among owners and masters of vessels and owners of wharves, and his compensation was paid by the persons at whose request he acted. *Held*, that the city could not appropriate money to indemnify him for expenses incurred in defending an action brought against him for an act done in the discharge of his duty. *Ib.*
- Taxation for other than public purposes.*] See CONSTITUTIONAL LAW, 99.

NATIONAL BANK.

See BANK.

NECESSARIES.

- Liability of infant for.*] See INFANT, 371.

NEGLIGENCE.

1. *Evidence of, presumption from injury.*] The defendant, for the purpose of a concert, hired a public hall and employed a person to decorate it. Among the decorations was a bust, placed on the outside of a balcony. The plaintiff sat in a seat on the floor of the hall immediately under the bust. The audience were requested, by the programme, to rise at a certain part of the concert, and when they did so the bust fell from its place and injured

the plaintiff. The plaintiff offered no evidence as to the manner in which the bust was secured. *Held*, that the mere fact that the bust fell was not sufficient evidence to go to the jury of the defendant's negligence. *Kendall v. Boston (Mass.)*, 446.

2. *Fire set by locomotive — burden of proof.*] In an action against a railroad company to recover for loss by fire caused by sparks from the defendant's locomotives, the burden of proof of negligence does not lie upon plaintiff, but it is for defendant to show that it was not negligence. *Burke v. Louisville & Nashville R. R. Co. (Tenn.)* 618, and *note*, 623.

Of directors of bank releases sureties on cashier's bond.] See BOND, 50.

In transmission of telegram.] See TELEGRAPH, 154.

Driving over another.] See ASSAULT AND BATTERY, 362.

By carrier — loss of passenger's property.] See CARRIER, 456.

By bank in payment of check.] See BANK, 517.

NEGOTIABLE INSTRUMENTS.

1. *Alteration of bill of exchange.*] Where the holder of a bill of exchange alters the acceptance thereof by the addition of a place of payment, the instrument is avoided as to all the parties to it not consenting to the alteration. *Whitesides v. Northern Bank (Ky.)*, 74.
2. *Certificates of deposit.*] A certificate of deposit, in the usual form, payable to the depositor's order, is negotiable, and the indorser thereof is liable as upon a note. *Purdee v. Fish (N. Y.)*, 176.
3. —.] A certificate of deposit or note, payable "in current bank notes," is negotiable. *Ib.*
4. *Liability of indorser of certificate of deposit.*] A certificate of deposit payable with interest to the depositor's order is a continuing security as between indorsee and indorser, and the latter is liable thereon until an actual demand is made, and the holder is not chargeable with neglect because the demand is not made at any particular time. *Ib.*
5. *Conditional acceptance of bill.*] A bill was accepted upon condition that the drawer should perform certain acts before he negotiated the same. He, however, negotiated it without performance of such acts. *Held*, that the acceptor and indorser were liable to a *bona fide* purchaser for value before maturity, and without notice of the condition and its non-performance. *Held*, also, that the possession of the bill by the drawer did not affect the purchaser from him with notice of the equities. *Merritt v. Duncan (Tenn.)*, 612.
6. *Partnership note — bankruptcy of firm — demand on one partner.*] Defendant was the indorser of a promissory note, made by a copartnership, in which no place of payment was designated. At maturity of the note the copartnership had been dissolved by its bankruptcy. *Held*, that a demand of one of the former copartners was sufficient to charge defendant. *Gates v. Beecher (N. Y.)*, 207.

Made by one member of non-trading firm.] See PARTNERSHIP, 757.

Mortgage given to secure note.] See MORTGAGE, 638.

Note of corporation to its trustees.] See CORPORATION, 645.

When rendered void by duress.] See DURESS.

NUISANCE.

*By act of others than owner of property — action by owner.] The owner of a building to the chimney of which a gas company has, without the owner's consent, so affixed a wire as to render the chimney unsafe, and ultimately to cause its fall upon a passer-by, may be liable for the damage so caused; and if, when so liable, he pays the damage, he has an action against the company for indemnity. *Gray v. Boston Gas-light Co.* (Mass.) 324, and note, 328.*

Liability of landlord for leasing infected premises.] See LANDLORD AND TENANT, 164.

Railroad over highway.] See RAILROAD, 364.

OFFICE.

1. *Abandonment of — estoppel.] Plaintiff was elected to an office in 1871 for the term of four years. In 1873 an act was passed providing for an election in November of that year to fill said office. Among the candidates for such election were the plaintiff and the defendant, who entered into an agreement in writing to abide the result of a primary election. At the primary election the defendant was selected, and in November he was elected, and thereupon qualified and took possession of the office, plaintiff surrendering the same. The statute was afterward decided to be unconstitutional and the election void, and plaintiff brought suit to recover possession of the office. Held, (1) that the plaintiff was not estopped by the agreement with defendant; (2) that such agreement and the surrender of the office by plaintiff did not amount to an abandonment or resignation. *Turnipseed v. Hudson* (Miss.), 15.*

2. *Appointment to — when may be oral.] A statute authorized "the county judge of the Jefferson county court" to appoint a collector of taxes. Held, that the appointment might be by parol and need not be evidenced by any record or other writing. *Hoke v. Field* (Ky.), 58.*

OFFICIAL BOND.

*Action on, against surety — for what acts surety liable.] An official bond was conditioned that the principal should "well and faithfully discharge the duties of the office of marshal of said village according to law." The complaint in an action on the bond against the sureties, alleged that the said officer, in his official capacity as marshal, "claiming to have a writ of replevin duly issued by a justice," wrongfully took from the possession of the plaintiff certain personal property, "claiming to act under and by virtue of such writ of replevin," but did not allege that the officer had any writ in fact. Held, on demurrer, that the complaint was insufficient, as the act set forth was done *colore officii* and not *virtute officii*, for which acts alone the sureties were responsible. *Gerber v. Ackley* (Wis.), 752.*

See BOND.

OFFICER.

When city may indemnify.] See MUNICIPAL CORPORATIONS.

ORDINANCE.

Liability for act committed while violating.] See ASSAULT AND BATTERY, 862.

PARENT AND CHILD.

Mother not entitled to wages of infant child after her remarriage.] The mother of a minor child, after remarrying, *held* not entitled to recover for the services of such child in the absence of an agreement to pay her therefor. *Hollingsworth v. Swedenborg* (Ind.), 687.

PARTIES.

In action on life insurance policy.] See INSURANCE, 829, 590, 722.

PARTNERSHIP.

1. *Relation of partners — renewal of partnership lease to one partner.]* A partnership formed to continue until a certain date leased premises for a term to expire at the same date, and made valuable improvements thereon. During the term one partner, without the knowledge of the others, took a renewal of the lease in his own name for a term to begin at the expiration of the partnership term. *Held*, that the new lease inured to the benefit of the firm, and that the partner was in equity a trustee of the lease for the partnership. *Mitchell v. Reed* (N. Y.), 252.

2. *Note of non-trading firm.]* One partner in a non-trading partnership cannot bind his copartner by a bill or note drawn, accepted or indorsed by him, in the name of the firm, not even for a debt which the firm owes, unless he have express authority therefor from his copartner, or unless the giving of such instrument is necessary to the carrying on of the firm business, or is usual in similar partnerships; and the burden is upon the holder of the note to prove such authority, necessity or usage. *Smith v. Sloan* (Wis.) 757.

3. *Power of one member of a firm of attorneys to make note.]* In an action against the members of a firm of attorneys on a note made by one of them for a firm debt, — *held*, that the one not signing the note was not liable in the absence of evidence that he expressly authorized it to be made, or that it was necessary to the carrying on of the firm business, or was usual in similar partnerships. *Ib.*

Note of firm — demand after bankruptcy.] See NEGOTIABLE INSTRUMENTS, 207.

Power to deal in land.] See STATUTE OF FRAUDS, 785.

PASSENGER.

See CARRIER.

PATENT.

Conspiracy — to induce one to violate an injunction. Privileged communications.] At the suit of the owner of a patent for vulcanized rubber, A, a dentist, was enjoined from using the preparation. Believing that A disregarded the injunction, the owner employed B to ascertain. B procured C to apply to A for a set of teeth upon a plate of vulcanized rubber. A

made the teeth upon such plate, delivered them to C, and received pay therefor. B and C reported the facts to the owner, and, on their affidavits, proceedings for contempt were commenced against A. *Held*, that B and C were not liable for a conspiracy to induce A to violate the injunction; that the owner of the patent had a right to resort to this method of learning the facts, and that the communications of B and C to the owner of the patent were privileged. *Knowles v. Peck* (Conn.), 542.

Agreements as to.] *See* CONTRACT, 459.

PAYMENT.

1. *Where to be made—debtor not required to follow creditor out of State.*] Where the payee of a money obligation, specifying no place of payment, is out of the State when the payment is to be made, the debtor is not obliged to follow him, but readiness within the State will be as effectual as actual payment to save a forfeiture. *Hale v. Patton* (N. Y.), 168.

2. *Condition in mortgage.*] A mortgage was conditioned to be due and payable, should any installment of interest remain unpaid for thirty days. Eight days after an installment of interest became due, the mortgagee, who was a single man residing in the house of his mother, left the State and remained absent during the residue of the thirty days. *Held*, that the mortgagor was not required to tender the interest at the house of the mother in the absence of notice that she was authorized to receive it, and that there was no forfeiture. *Ib.*

At auction sale.] *See* AUCTION, 812.

Under duress of property.] *See* DURESS, 867.

PLEADING.

When condition in express company's receipt must be pleaded.] *See* CARRIER, 800.

Pleading over after plea in abatement to an indictment.] *See* CRIMINAL LAW 845.

Statements in, when privileged.] *See* SLANDER AND LIBEL, 598.

POLICE OFFICER.

Right of, to arrest without warrant.] *See* ARREST.

PRESUMPTION.

As to date of bond undated.] *See* BOND, 5.

As to receipt of letters.] *See* LETTERS, 285.

PRIVILEGED COMMUNICATIONS.

See PATENT, 542.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION, 677.

PROBATE.

Of will when not proof of death.] *See* EVIDENCE, 144.

PROXIMATE CAUSE.

See CARRIER, 681.

PUBLIC OFFICE.

See OFFICE, 15.

PUNITIVE DAMAGES.

See DAMAGES.

RAILROAD.

1. *Location of, upon street.*] The use of a street as a site for a railroad track does not give a right of action to the owners of adjacent lots, unless it materially hinders the ordinary use of the street; but when such use does unreasonably abridge the right of lot owners to use the street as a means of ingress and egress, an action for damages will lie against the railroad company. *Elizabeth, etc., R. R. Co. v. Combs* (Ky.), 67.

2. *Damages to adjacent property — rule as to.*] Where the houses adjacent to a street used as the site of a railroad track are damaged by having smoke, soot or fire from passing engines thrown or blown into, against them, the owners thereof have an action therefor. *Ib.*

3. *Over highway — frightening horses.*] A railroad corporation whose road passes over a highway by a bridge is not liable to a traveler on the highway for damages caused by the fright of his horse at the noise made by a train of cars passing over the bridge in the customary manner, although the corporation know that, because of special circumstances, accidents of a similar character are peculiarly liable to happen there, and although they give no warning of the approach of the train. *Faor v. Boston and Lowell R. R. Co.* (Mass.) 364.

Assessment of, for local improvements.] *See* BETTERMENTS, 584.

Fire communicated by locomotive.] *See* NEGLIGENCE, 618.

Measure of damages to adjacent property by use of street.] *See* DAMAGES, 67.

When obligation as carrier is changed to that of warehouseman.] *See* CARRIER, 433.

RAPE.

See CRIMINAL LAW, 709.

RECORD.

See DEED.

RECOUPMENT.

Of damages in action of account.] *See* BAILMENT.

REGISTRY.

See DEED.

REMEDIAL STATUTES.

See CONSTITUTIONAL LAW, 656.

REPEAL.

Of usury law, effect of, an existing defense:] See USURY, 81.

Of statutes relating to interest, effect of.] See INTEREST, 564.

REPLEVIN.

1. *Loss of property held in replevin.]* Where property is taken by plaintiff in replevin, and while in his possession pending the proceedings, dies or is destroyed without his fault, he is not liable to defendant for its value in case of a verdict in favor of defendant. *Bobo v. Patton* (Tenn.), 593.

2. *Of wheat due for rent.]* Plaintiff leased wheat-land to defendant, defendant agreeing to pay as rent one-half the wheat-crop at the threshing time. When the wheat was threshed defendant delivered only one-third, retaining the remainder. *Held*, that plaintiff could not replevy the balance of wheat due him under the lease. *Lacy v. Weaver* (Ind.), 688.

By vendor of goods seized on attachment.] See STOPPAGE IN TRANSITU, 84.

RESPONDEAT SUPERIOR.

See CONTRACTOR AND CONTRACTEE, 267.

REVIEW.

Of final judgment on habeas corpus.] See HABEAS CORPUS, 211.

REWARD.

For conviction of criminals.] Defendant offered a reward for the "capture and conviction" of each of certain criminals. Plaintiff captured two of them who confessed their guilt; but the indictments against them were dismissed at the solicitation of the defendants' attorneys, in order to use them as witnesses against the others. *Held*, that plaintiff was entitled to the reward. *Louisville & Nashville R. R. Co. v. Goodnight* (Ky.), 89.

SABBATH

See SUNDAY.

SAFE DEPOSITS.

See BANK.

SALE.

1. *Delivery, when sufficient.]* Evidence that a person seeing an unfinished piano in the maker's shop offered to purchase it of him, if he would finish it; that the offer was then and there accepted; that a bill of sale was then and there made; that the price was made at a subsequent day, the piano being left to be finished, will authorize a jury in finding a delivery of the piano sufficient to pass the title as against a subsequent purchaser. *Thorn-dike v. Bath* (Mass.), 818.

2. *Title — to personal property contracted to be sold — damages — measure of.]* Plaintiff agreed to sell, and defendant to purchase, a quantity of wood which plaintiff was to draw and pile in a certain place where defendant was to measure, receive and pay for it at a specific price per cord. The

wood was drawn and piled and defendant had measured and received part, but refused to measure and receive the remainder. The wood was burned. *Held*, that the title of the unmeasured wood was in plaintiff, and he was entitled to recover from the defendant, not the contract price thereof, but the difference between the contract price and the market price at the time and place it should have been accepted. *Pittsburgh, etc., Ry. Co. v. Heck* (Ind.), 713.

2. *Of invalid obligations — purchaser presumed to know the law.*] Plaintiff purchased from defendants county warrants drawn by the auditor upon the treasurer, but which were upon their face invalid, and not a charge upon the county. *Held*, that plaintiff was presumed to know the law, and in the absence of fraud or misrepresentations, could not recover the price paid defendant. *Christy v. Sullivan* (Cal.), 655, and *note*, 656.

At auction.] See AUCTION.

Induced by fraud — conversion by innocent purchaser.] See CONVERSION, 894.

Stoppage in transitu.] See STOPPAGE IN TRANSITU, 84, and *note*, 87.

Sufficiency of memorandum of.] See STATUTE OF FRAUDS.

SALE OF STOCK.

See DIVIDEND, 732.

SEDUCTION.

Action for — evidence.] Evidence that the plaintiff's marriage with his reputed wife was void, is, in an action for the seduction of his reputed daughter, admissible on the defendant's part to rebut a presumption of actual service by showing that the plaintiff was not legally entitled to her services; and in mitigation of damages. *Howland v. Howland* (Mass.), 381.

SHERIFF.

Cannot maintain interpleader as to money in his hands.] A sheriff sold goods seized on execution, and after satisfying the execution had money left in his hands which was claimed by various parties. *Held*, that he could not maintain a bill of interpleader to determine their rights; but that he should pay the money into court and leave them to apply there. *McDonald v. Allen* (Wis.), 754.

SHERIFF'S SALE.

Vendor's lien for purchase price.] See VENDOR AND PURCHASER, 44.

SLANDER AND LIBEL.

1. *Female chastity.*] Words charging a female with self-pollution are not actionable *per se*. *Anonymous* (N. Y.), 174.
2. *Special damages.*] In an action for slander, in charging the plaintiff with self-pollution, it was alleged, as special damage, that the father of the plaintiff, with whom she lived, and upon whom she was dependent, had, by reason of the charge, withheld from the plaintiff a dress and a course of lessons in music, which, prior to the charge, he had promised her. The

father testified that he did not believe the charge. *Held*, that such damages would not maintain the action. *Ib*.

3. *Repetition after action.*] In an action for slander, evidence of a repetition of the slander charged, or of the speaking of other slanderous words, after the commencement of the action, is not admissible to show malice and enhance the damages. *Fruzer v. McCloskey* (N. Y.), 193.
4. *Statements in a legal pleading concerning person not a party.*] In proceedings by R. as the next friend of a female infant to remove the guardian of such infant, the petition alleged as a reason for such removal that the guardian kept in his family, B., a girl whose "reputation is ruined, and she is now an example of shame and prostitution." *Held*, that the statement was conditionally privileged, although B. was not a party to the record, and that to render R. liable to B. for libel, malice must be shown. *Ruohs v. Backer* (Tenn.), 598.
5. *Words spoken under the influence of passion.*] The fact that slanderous words were spoken in the heat of passion, which was provoked by the one concerning whom they were spoken, may be shown in mitigation of damages. *Jauch v. Jauch* (Ind.), 699.

SLANDER OF PROPERTY.

1. *Jurisdiction of court of equity as to slander of title.*] The jurisdiction of a court of equity does not extend to cases of libel, or of slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involve no breach of trust or of contract. *Boston Diatite Co. v. Florence Manufacturing Co.* (Mass.) 810.

SPECIFIC PERFORMANCE.

Of oral contract as to patent.] See CONTRACT, 459.

STATUTE OF FRAUDS.

1. *Promise to answer for the debt of another.*] Land was conveyed by C. to plaintiff as security for a debt. He reconveyed to C. upon the pledge to him by defendant of certain railroad bonds, which defendant promised to redeem at par within a year. *Held*, that defendant's promise was original and not collateral; and that, on his failure to redeem, plaintiff might foreclose and sell the bonds and hold him personally liable for any deficiency. *Booth v. Eighmie* (N. Y.), 171.
2. *Oral agreement to reconvey lands.*] An oral agreement by the vendee of land to reconvey it is within the statute of frauds, and where it appears in a bill for specific performance that the agreement was oral, the fact can be taken advantage of by demurrer. *Ahrend v. Odiorne* (Mass.), 449.
3. *Verbal promise to alter mortgage invalid.*] T., who had executed a mortgage on real estate to H. to indemnify him, applied to B. to become surety for him, verbally promising to change the mortgage so as to secure B. (which change H. assented to and agreed to make). B. thereupon became surety and was obliged to pay the bond. *Held*, that the promise to alter the mortgage was within the statute of frauds and invalid. *Irwin v. Hubbard* (Ind.), 679.

4. *Sufficiency of memorandum of sale.*] A sheriff who sold under a judgment of foreclosure, indorsed on the order of sale this: "Sold to Asa J. Ridgway for twenty-four hundred dollars, October 16, 1869. J. D. Phelps, Sheriff L. C." *Held*, not sufficient to identify the property under the statute of frauds. *Ridgway v. Ingram* (Ind.), 706.
 5. *Partnership may be formed by parol to deal in lands.*] A parol agreement for a partnership for the purpose of dealing in lands is not within the statute of frauds, and is valid. *Holmes v. McCray* (Ind.), 735.
 6. *Contract of indemnity between sureties.*] A contract between sureties to the same instrument, whereby one surety undertakes to indemnify another, is not within the statute of frauds, and may be made by parol. *Horn v. Bray* (Ind.) 742.
- Oral agreement as to co-operation of patent—partnership agreement.*] See CONTRACT, 459.

STAY LAWS.

Invalid.] See CONSTITUTIONAL LAW, 583.

STOCK.

See DIVIDEND, 732.

STOPPAGE IN TRANSITU.

Right of, after attachment by creditor — replevin by vendor.] Plaintiff sold goods to C. and delivered them to a carrier. Defendant, a constable holding an execution against C., levied on and seized the goods while in the carrier's possession and paid the freight charges thereon. Plaintiff demanded the goods from defendant, without paying or tendering the amount of the freight charges, and being refused, brought replevin. *Held*, (1) that plaintiff's right of stoppage *in transitu* was not terminated by the levy and seizure, but (2) that the lien for freight charges, to which defendant had rightfully succeeded, was prior to plaintiff's right, and that plaintiff could only bring replevin after discharging that lien. *Rucker v. Donovan* (Kan.), 84, and note, 87.

STREET.

Location of railroad upon — damage to adjacent property — measure of.] See RAILROAD, 67.

SUICIDE.

Condition against, in insurance policy.] See INSURANCE, 628 and note, 628

SUNDAY.

1. *Unlawful traveling on — injury from defect in highway.*] A person traveling on Sunday in violation of the statute cannot recover for injuries received by reason of the insufficiency of the highway. *Johnson v. Town of Irasburgh* (Vt.), 111.
2. *Necessity or charity.*] Where a statute forbids traveling on Sunday "except from necessity or charity," a necessity to render traveling lawful, must actually exist; an honest belief that it is necessary is not sufficient. *Id.*

3. —.] One who works by night instead of by day, and who travels on the Lord's day for the purpose of seeing his master and inducing him to change his hours of labor from the night to the day-time, in order that he may sleep better, is not traveling from necessity or charity, and cannot maintain an action against a town for an injury sustained by him, while so traveling, by reason of a defect in a highway, which the town is by law obliged to keep in repair. *Connolly v. City of Boston* (Mass.), 396, and note, 397.
4. —.] One who travels from one town to another on the Lord's day for the sole purpose of visiting a friend, whom he knows to be sick, and thinks may be in need of assistance, and of rendering such assistance as on inquiry he might find to be necessary, is traveling from charity; and in an action against a railroad corporation, for injuries sustained while a passenger on that day, on putting in evidence that he was traveling for the purpose above stated, he is entitled to go to the jury on the question whether he was traveling lawfully or not, although he offers no evidence of the ground of his belief that his friend was in need of assistance. *Doyle v. Lynn & Boston R. R. Co.* (Mass.) 431.

SURETIES.

- On bond of bank officer, released by negligence of directors.]* See BANK, 50.
- Contract of indemnity between.]* See STATUTE OF FRAUDS, 742.
- On official bond.]* See OFFICIAL BOND, 752.

TAXATION.

1. *Notes deposited out of State—mobilia personam sequuntur.]* Plaintiff, a resident of Kansas, agreed to sell and deliver lands in Illinois to L., a resident of Illinois, upon the payment of notes executed by L. for the purchase price and deposited with a third person in Illinois. *Held*, that plaintiff was not taxable in Kansas on the notes. *Wilcox v. Ellis* (Kan.), 107.
2. *For money loaned and secured out of the State.]* A State legislature has power to tax persons residing in the State for money lent by them to persons residing out of the State and secured upon real property out of the State. *Kirtland v. Hotchkiss* (Conn.), 546.
3. *Collector of taxes not obliged to give receipt.]* A collector of taxes is under no obligation to give receipt for taxes paid to him, unless the statute expressly requires it; and a custom to do so will not bind him. *Stiles v. Hitchcock* (Vt.), 121.
4. *Tax on litigation.]* A statute imposing a tax upon each suit at law, to be paid by the unsuccessful party, *held* not in contravention of a constitutional provision that "all courts shall be open, and every man shall have right and justice administered without sale, denial or delay." *Harrison v. Willis* (Tenn.), 604.
5. —.] The constitution authorized the legislature to tax certain specified business classes, among which litigants were not included. *Held*, that its power to tax was not limited to the classes named, and that a statute im-

posing a tax upon one commencing a suit at law was constitutional. *State v. County Commissioners* (Neb.), 641.

For other than public purpose.] See CONSTITUTIONAL LAW, 99.

TAXES.

See TAXATION.

TELEGRAPH.

Error in transmission — damages.] B sent a message by defendant's telegraph to plaintiff, asking for \$500. By negligence of defendant's servant the message was changed to \$5,000, which sum plaintiff sent, and B absconded with it. *Held*, that defendant was not liable for the loss, its negligence not being the proximate cause thereof. *Lowery v. Western Union Telegraph Co.* (N. Y.) 154.

THREATS.

When actionable.] See ACTION, 129.

TIME.

1. *Computation of.*] In computing time from the date, or the day of the date, or from a certain act or event, the day of the date, act, or event is to be excluded, unless a different intention is manifested by the instrument or statute under which the question arises. *Bemis v. Leonard* (Mass.), 470.
2. —.] Under a statute requiring the copy of the writ and of the return of the attachment to be deposited in the town clerk's office "at any time within three days thereafter," the day of the attachment is to be excluded. *Ib.*

TORT.

For injuries occasioned out of the State.] Defendant's dog, owned and kept in Massachusetts, strayed into an adjoining State and bit plaintiff. In an action of tort in Massachusetts for the injury, there was no evidence that the statute of such adjoining State made the injury actionable, nor was it proved that the defendant had knowledge that his dog was accustomed to bite mankind and therefore liable at common law. *Held*, that the action would not lie, although the statute of Massachusetts gives an action for such injuries within the State. *Le Forest v. Tolman* (Mass.), 400.

TORT-FEASORS.

See JOINT TRESPASSERS.

TRADE-MARK.

Name of place of business.] Where one has established a business at a particular place, from which he has or may derive profit, and has attached to such business a name indicating to the public where it is carried on, — *e. g.* "No. 10 South Water street," — he thereby acquires property in the name, which will be protected from invasion by a court of equity on principles analogous to those applicable in case of the invasion of a trade mark. *Glen and Hall Menu Co. v. Hall* (N. Y.), 378.

TRESPASS.

By officer in attaching goods.] See ATTACHMENT, 420.

TRIAL.

Jury of more than twelve men.] See CRIMINAL LAW, 80.

Jury must understand English.] See JURY, 38.

TROVER.

By second mortgages.] See CHATTEL MORTGAGE, 816.

TRUST.

Devise to an executor in trust — trust is personal.] Land was devised to the executor named in the will in trust for certain purposes. The executor renounced, and an administrator with the will annexed was appointed. Held, that the administrator did not become trustee nor succeed to any right in the trust estate. Dunning v. Ocean National Bank (N. Y.), 293.

ULTRA VIRES.

See CORPORATION, 781.

USURY.

1. *Defense of, after repeal of laws.] In an action on a promissory note the defendant set up the defense of usury. Held, that the defense was good, although the usury laws had been repealed after the action was brought. Smith v. Glanton (Tex.), 31.*
2. *Agreement not to plead — withdrawing plea of — amendment.] An agreement to withdraw the plea of usury is against public policy and cannot be enforced; but where a defendant, having once pleaded usury, withdraws the plea in consideration that the plaintiff will consent to a continuance he ought not to be afterward allowed to amend by filing the same plea again. Clark v. Spencer (Kan.), 96.*

VARIANCE.

See CRIMINAL LAW.

VENDOR AND PURCHASER.

1. *Vendor's lien — sale of land on execution — lien for excess of purchase-money.] Plaintiff's land was sold by the sheriff, at auction, under an execution and bought by defendant, who bid more than enough to satisfy the execution. Held, that plaintiff had a lien on the land for the excess of the purchase-money. Yarborough v. Wood (Tex.), 44.*
2. *Vendor's lien, existence of.] In Massachusetts the vendor of real estate, by an absolute deed, has no lien thereon for the unpaid purchase-money in the absence of a written agreement of the parties to that effect. Ahrend v. Odiorne (Mass.), 449.*
3. *Vendor's lien — when specific lien prior to.] The equitable lien of the vendor of land for unpaid purchase-money is subordinate to a specific lien acquired by a creditor of the vendee, whether with or without notice, before pre*

ceedings are instituted to enforce such equitable lien. *Pain v. Inman* (Tenn.), 577.

Damages in action on covenant of warranty.] See DAMAGES, 49.

WAIVER.

Of exemption laws.] See EXEMPTION, 61.

WAR.

Effect of, on contracts of life insurance.] See INSURANCE, 495, and note, 512.

WAREHOUSEMAN.

When carrier becomes.] See CARRIER, 433.

WILL.

1. *Appointment of executor — delegation of authority to appoint.*] A testator appointed his wife executrix of his will, and requested "that such male friend as she may desire shall be appointed with her as co-executor." *Held*, (1) that the delegation of power to appoint the executor was valid at common law; (2) that it was valid under a statute directing letters testamentary on wills to be issued "to the persons named therein as executors." *Hartnett v. Wandell* (N. Y.), 194.
2. —.] *Semble*, where a testator delegates to an executor named in the will the power to select a co-executor, such selection can only be made after the executor named has duly qualified as executor. *Ib.*
3. *Devise — when devise over void.*] A testator gave his widow certain personal estate, and provided that *if any remained at her decease* it should be equally divided among his children. *Held*, that an absolute power of disposal was given to the widow, and that the gift over was inconsistent with this power, and therefore void. *McKenzie's Appeal* (Conn.), 525.

WITNESS.

1. *Right of accused when witness in his own behalf.*] When a person charged with the commission of a crime becomes a witness, under a statute providing that he may, "at his own request, but not otherwise, be deemed a competent witness," and testifies that he did not commit it, he waives his constitutional privilege as to criminating himself, and may be cross-examined as to every thing relevant to the issue. *Commonwealth v. Nichols* (Mass.), 846, and note, 848.
2. *Impeachment of, in criminal trials — defendant as witness.*] Where, under a statute allowing one charged with crime to testify in his own behalf, an accused person becomes a witness, the prosecution may show that his reputation for truth and veracity is bad, but cannot impeach his general moral character. *Fletcher v. State* (Ind.), 673.

Opinions of non-experts.] See EVIDENCE, 401.

WORDS.

"*Fiduciary character.*"] See BANKRUPTCY, 40.

"*Necessity or charity.*"] See SUNDAY, 396, 431.

